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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~318.~~ 245

JOHN S. ATCHINSON, MARY L. ATCHINSON, AND HARRIET B. TRUETT, APPELLANTS,

vs.

PETER PETERSON, GEORGE TRAVIS, W. H. PHELPS, WILLIAM FAY, M. MUNROE, AND WILLIAM COLLUM.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED DECEMBER 4, 1872.

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1 In the district court, third judicial district, in and for the county of Lewis and Clarke, Montana Territory.

TRANSCRIPT ON APPEAL.

JOHN S. ATCHINSON ET AL
vs.
P. PETERSON ET AL.

Be it remembered that among the proceedings, records, and pleadings had, made, and filed in the above-entitled cause herein, are the following, to wit:

In district court, third judicial district, county of Lewis and Clarke, Territory of Montana.

JOHN S. ATCHINSON ET AL
vs.
P. PETERSON ET AL.

Be it remembered that on the 3rd day of July, A. D. 1871, the above-named plaintiffs commenced their action which is above entitled, by filing with the clerk of the said court their complaint, which is in words and figures, to wit:

2 In district court, third judicial district, county of Lewis and Clarke, Territory of Montana.

JOHN S. ATCHINSON, MARY L. ATCHINSON, AND Harriet Truett, plaintiffs,
vs.
PETER PETERSON, TRAVIS, JOHN DOE, Richard Roe, John Denn, Richard Tenn, Samuel Doe, Henry Roe, Frank Doe, Samuel Roe, George Doe, and William Roe, defendants.

Now come the above-named plaintiffs, and complaining of Peter Peterson, Travis, whose christian names are unknown to these plaintiffs, John Doe, Richard Roe, John Denn, Richard Tenn, Samuel Doe, Henry Roe, Frank Doe, Samuel Roe, George Doe, and William Roe, the true names of the last ten defendants being unknown to these plaintiffs, show unto this honorable court—

That, during the year A. D. 1864, the grantors and predecessors in interest of these plaintiffs appropriated and acquired a right to
3 use and control all of the waters flowing in that certain stream known as Ten-Mile Creek, situate in the county of Lewis & Clarke, and Territory of Montana, or so much thereof as would fill the ditches hereinafter described. And that the said plaintiffs further show that, at the time of such appropriation, the waters of the said Ten-Mile Creek were not used and had not been appropriated by any person or persons whomsoever.

And the said plaintiffs further show that, during the said year of 1864, and the years of 1865 and 1866, the grantors and predecessors in interest of these plaintiffs proceeded to construct those certain water-ditches, known as the Helena water-ditch, and the Yaw Yaw ditch,

the same extending from the said Ten-Mile Creek to Last Chance and Dry gulches, in the said county and Territory.

That said water-ditches were constructed at great expense, to wit, the sum of one hundred and seventeen thousand dollars. That the said ditches were constructed for the purpose of conveying water from the said Ten-Mile Creek to said Last Chance and Dry gulches, to be there sold to the miners engaged in working and mining said gulches, whereby these plaintiffs, and their grantors and predecessors in interest, could and did realize large gains and profits.

And the said plaintiffs further show that, long subsequent to
4 the appropriation of the said waters of the said Ten-Mile Creek by these grantors and predecessors in interest, and the construction of the said water-ditches as aforesaid, to wit, during the years A. D. 1867, 1868, 1869, and 1870, the said defendants went upon the said Ten-Mile Creek, and above the points where the said plaintiff's ditches divert the water from the said Ten-Mile Creek, and there commenced mining, sluicing, and excavating, and for that purpose running, reservoiring the waters of the said Ten-Mile Creek, and from the date of such entry have continued to mine, sluice, and excavate on the said creek, and to use and reservoir the said waters for that purpose, and are so doing at the present time.

And the said plaintiffs further show that prior to such entry by the said defendants, as aforesaid, and their wrongful acts, the *the* waters of the said Ten-Mile Creek were clear and free from all tailings and sediment.

And the said plaintiffs further show, that by reason of the acts of the said defendants and their mining and using the water as aforesaid, the waters of the said Ten-Mile Creek have been filled and charged with mud, tailing, and sediment, which has been washed down
and into the said ditches of these plaintiffs, thereby filling up
5 and greatly injuring the said ditches, and obstructing the flow of the water through the same, and that the water carried through the said ditches to the said gulches has been greatly deteriorated in quality and value, to the great damage and injury of these plaintiffs. That the said plaintiffs have been compelled to lay out and expend large sums of money in and about keeping the said ditches free from mud, tailings, and sediment, so washed down into the said ditches by the said acts of the defendants, and the said water is greatly depreciated in value; that the said defendants threaten to continue the wrongful acts above set forth.

The said plaintiffs further allege and show, that the said defendants are irresponsible and unable to respond in damages to the said plaintiffs, and that these plaintiffs have no adequate remedy at law; wherefore the said plaintiffs pray that they may have judgment for their costs of action; that this honorable court may grant an order of injunction during the pendency of this action, enjoining and restraining the said defendants, their agents and employees, from the commission of the wrongs and grievances above set forth, and that upon a final hearing the injunction may be made perpetual, and for such other and
6 further relief as may be just and equitable.

GEORGE MAY,
CHUMASERO & CHADWICK,
Plaintiff's Attorneys.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

John S. Atchinson, being first duly sworn, deposes and says that he is one of the plaintiffs named in the foregoing complaint; that he has heard the same read, and knows the contents thereof; that the matters therein stated are true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true, and that he has reason to so believe.

JOHN S. ATCHINSON.

Subscribed and sworn to before me this 3rd day of July, A. D. 1871.

W. F. CHADWICK,
Notary Public.

And that upon the 17th day of July, A. D. 1871, the said defendants filed their answer to the said complaint, which is in the words and figures following, to wit:

7 Third judicial district court, Lewis and Clark County, Montana Territory.

JOHN S. ATCHINSON & OTHERS, PLAINTIFFS,
vs.
GEORGE TRAVIS & OTHERS, DEFENDANTS.

The defendants herein, for answer to the complaint of the plaintiffs in this action, deny that during the year 1864, or at any time before the year 1866, the plaintiffs, or their grantors, or predecessors in interest, appropriated or acquired the right to use or control in any way whatever the waters, or any part thereof, flowing in Ten-Mile Creek, in the county of Lewis and Clarke, Montana Territory; deny that at the time of the alleged appropriation of the said waters mentioned in the complaint herein the said waters had been appropriated by any persons whomsoever; deny that during the year 1864 or 1865, or at any time before the year 1866, the plaintiffs, their grantors, or predecessors in interest, constructed the water-ditches known as the Helena water-ditch, or the Yaw Yaw ditch, in said county and territory.

8 Defendants admit that during the years 1867, 1868, 1869, and 1870, they and their predecessors in interest had been mining and sluicing on said Ten-Mile Creek above the points where the said ditches of plaintiffs divert the waters from said creek.

Defendants deny that their mining operations injure the quality or quantity of the water in said creek, or that they fill up or charge the plaintiffs' ditches with mud, tailings or sediment, or that they compel plaintiffs to lay out or expend any sums of money to keep said ditches clear or clean, or that their said mining operations injure the plaintiffs in any manner whatever.

Defendants, further answering, allege that in the spring of 1865, and long before the plaintiffs or their predecessors in interest had appropriated the waters of said Ten-Mile Creek, or constructed their said ditches, these defendants and their predecessors in interest had appropriated the waters of said Ten-Mile Creek for mining purposes; that they located and took up a certain lot or tract of mining-ground, to wit, about three miles long up and down said Ten-Mile Creek, commencing at a point about twelve or fifteen miles above the place where

9 plaintiffs' ditches divert the waters from said creek, and com-

menced mining the same, and using all the waters of said creek at said point for the purpose of mining the said ground, and acquired the prior right to use the said waters for that purpose; that said ground is rich in gold, and valuable for mining purposes; that the waters of said creek, at the point aforesaid, are absolutely necessary for the defendants to mine said ground appropriated and located as aforesaid; that the defendants' mining-ground and mining operations are situated as aforesaid, at least twelve or fifteen miles above the head of plaintiffs' ditches; that not more than forty or fifty inches of water during the late summer season naturally flows in said creek at the point where defendants' mining operations are situate; and that there naturally flows in said creek, at the points where plaintiffs' ditches divert the same, about two thousand inches, all of which, except the forty or fifty inches used by defendants as aforesaid run or flow into the said creek from tributaries below the mining operations of defendants; that defendants and their predecessors in interest have been the owners of
10 and in the actual and peaceable and continued possession of the said mining-ground, and the waters of the said creek, as against plaintiffs, and all persons whomsoever, since the spring of 1865, and at the present time these *plaintiffs* are, and for more than five years last past have been, and they plead and rely on the statute of limitations as well as their equities in the premises.

Defendants deny that they are insolvent or unable to respond in damages.

Wherefore defendants ask to be here dismissed without delay, with their costs herein expended.

G. G. SYMES,
Att'y for Defendants.

MONTANA TERRITORY,
Lewis & Clarke County, ss:

George Travis, being duly sworn, says that he is one of the defendants herein; that he has heard read the foregoing answer, and knows the contents thereof; and that he has reason to believe and does believe the matters stated in the said answer are true.

GEORGE TRAVIS.

Subscribed & sworn to before me this 10th day of July, 1871.
[SEAL.] G. G. SYMES,
Notary Public.

11 Service of copy of the foregoing answer admitted this 17th of July, 1871.

CHUMASERO & CHADWICK,
Plaintiffs' Attorneys.

And that upon the day of November, A. D. 1871, the cause came on for a hearing at the October term, A. D. 1871, of the above-named court, before the judge of the said court, without a jury, and the plaintiffs introduced the following-named witnesses and record evidence, and the defendants introduced the witnesses and evidence hereinafter set forth.

The plaintiffs first called CORNELIUS HEDGES, HENRY JURGINS, and J. W. HARTWELL, who each testified relative to the location of the Helena water-ditch described in the complaint, as to the commencement of work upon the same in the fall of 1864, and as to the completion of said ditch; also as to the parties originally interested in the

location of said ditch, appropriation of the waters of the said Ten-Mile Creek mentioned in said complaint, and as to certain transfers of the interests of the original owners of said ditch and water-right, showing that the plaintiffs are the owners thereof.

Plaintiffs then called MARTIN HOLLOWAY as a witness, who testified as follows:

12 I have known the Helena water-ditch since 1865; worked on ditch in spring of 1870, cleaning it out; also the spring last past. I commenced nearly opposite the hot springs, and cleaned up to Nelson Gulch, being from 3 to 4 miles. We had considerable sand to contend with. As we went up it grew heavier, and when we got near Nelson we had upwards of one foot. In my judgment this sand or sediment in the ditch came from riley water running through ditch.

Cross-ex.:

Sediment must have come from body of water running through ditch; I think came out of Ten-Mile Creek; had to clean ditch all the way; sand all the way; only one stream that amounts to anything that runs into ditch. Caving of banks don't form sediment; fills in where it falls, and lies there. I have been mining good many years.

LEVI CHILDS:

Worked on ditch cleaning it out in 1871; commenced at mouth of ditch and worked down to Nelson Gulch some five miles; sand all the way from four inches to one foot in depth; sand looked as if it had been washed some ways—think it came into ditch from Ten-Mile Creek.

Cross-ex.:

13 Have mined about twelve years; think, from all appearances, sand came down the creek. If it had been from the banks of ditch or little ravines it would have staid where it fell. We turned out water on middle of section of ditch this last summer, because it was filled with sand. As we went up the ditch the sand became coarse. It was fine sand and sediment where we turned out water this last summer. On all the larger gulches or ravines there are flumes to carry water across. Some rains last summer, but I found it made no difference. The water was turned out last May, because the ditch was filled with slum and sediment. I have been one of the ditch-tenders this last summer. I think the sand came down Ten-Mile; judged from appearance of water that there was mining going on above head of ditch on Ten-Mile.

JERRY ROBINSON:

Have been attending to Helena water-ditch since April, 1869. Water running in ditch when I took charge, April, 1869. I think the water was a little riley in 1869, but not so much as in 1870. It was more riley in 1871 than in 1870. There is mining up on Ten-Mile Creek above head of ditch. It is hydraulic and sluicing. This mining brings sand and sediment down into the Helena ditch. The water in the
14 ditch is a good deal thicker in the spring while miners are hydraulicing. I think the mining above on Ten-Mile causes the sand to come into the ditch. There is sand and sediment carried along the waters of Ten-Mile into the ditch. There has been a sand-gate erected six or eight hundred feet below the head of the ditch. We had to sluice out this sand-gate every afternoon. It is four feet wide and

fifty feet long. It was put in April or May last, and done to catch the sand that came down the ditch. We cleaned it out every twenty-four hours; when they were mining above on Ten-Mile it would always fill up every 24 hours. It had to be done until some time in August. While sluicing out sand-gate the whole of the water in the ditch is wasted. I helped clean out the ditch last spring. I found from four to fourteen inches of sand and sediment in the ditch; some places deeper than in others; some days I had from five to seven men helping me clean out ditch; men performed from ten to twelve days labor each. We cleaned about eight miles with this force. I cleaned the flume across Nelson Gulch; it is about three hundred feet long; found good deal of sand in it. In some places it was half full, especially in the center; size of flume five feet in width, and about two feet deep; found heavy body of sand in ditch about Colorado Gulch; a foot deep in some places; Colorado Gulch is about two or three miles from head of ditch; a sink to catch sand was put in this last summer; a dam is put across Colorado Gulch twelve feet high. It would cause water to set back seventy-five feet, and give sand and sediment chance to settle. I am familiar with ditches. The effect of twelve inches of sand in a ditch is to decrease the capacity thereof a very great deal; could not give the inches. The depth of sand accumulated a' Colorado, where water flowed from ditch into sink, was from four to five feet. This accumulation was in five or six days; without sand-gates to catch the sand and sediment while mining is going on above, ditch would fill up in less than one month. No sand-gate in 1869, and the sand did not trouble us that year. I have mined twenty-two years. I prefer clear water for mining, because I can do more work, and save gold better. Muddy water has the effect to rot flume.

Cross ex.:

Less grade to ditch at Nelson Gulch than above; no little streams running down into ditch in the spring to amount to anything. I am positive the sand in ditch came down Ten-Mile; about half as much sand in 1870 as in 1871; sand heaviest when they commence mining. Mighty little sand accumulates in ditches when there is little mining. I think could be used for mining where I attended ditch, and would not be materially injured for the purpose; have drank it; force on ditch same in 1870 as 1871.

Sand that comes from side-hill amounts to nothing; what falls in from side of ditch is plainly distinguished from the sand and sediment of the stream. Where stock crosses, it has become so hard that ditch does not fill up. Rush of water commenced in May in Ten-Mile. In July first put it all in ditch; saw no difference in amount of sand and sediment until August.

JOHN MERRY:

Reside on Ten-Mile Creek. Know ditch; live ¼ or ¾ of mile from sand-gate, at upper portion of ditch; said sand-gate in months of May, June, and July, most every day, saw it sluiced out three times; size of gate three to four feet deep, length from thirty to fourty feet; when I saw it sluiced out it was full, but I cannot state the number of feet of sand. Robertson sluiced it out every day. When it was sluiced out all the water flowed back into Ten-Mile from the ditch.

FRANK TAYLOR:

Am engaged in mining in Last Chance Gulch; get water from

18 the Helena water-ditch. The water was muddy in June, 1871; had not noticed it before; we quit work in July last. My foreman called my attention to the muddy condition of water. There is a difference of from ten to twenty cents per inch in the value of muddy water and clear water in Last Chance Gulch; price reduced ten cents an inch in 1871.

W. A. CHIESMAN:

There is a difference between clear water and muddy water for mining purposes. Can do more with clear water; saves fine gold better; generally muddy water is worth one-fifth less than clear; am mining in Last Chance Gulch; used water principally from Yaw Yaw ditch.

JOHN S. ATCHINSON:

I am one of the owners of ditch; have been since 1867; water was clear in 1867 in Ten-Mile; clear in 1868. In 1869 it commenced being quite riley. In 1870 more riley, and in 1871 very muddy and bad; don't know of any mining being done on Ten-Mile in 1867; first mining to my knowledge on Ten-Mile was in 1868; that year several claims were being worked, but not by hydraulic-mining. I was upon Ten-Mile this spring; saw two or three hydraulic claims; was not up above to the head of the mining that was being done. The effect of the min-
18 ing upon the water of Ten-Mile is to muddy it up and charge it with sand and sediment, which comes down into the ditch and fills it up with sand, slum, and sediment and tailings; saw ditch cleaned out this spring about Nelson Gulch; was all of one foot of sand there; flume over Nelson was half full of sand and sediment; expense of cleaning out ditch last spring was five hundred dollars. We put in a sand-gate near head of ditch this last spring; thou't it would be sufficient to catch sand, but it would not, and we put in another at Colorado Gulch. If it was not for these sand-gates the ditch would fill up full in thirty days when they are running the hydraulic above on Ten-Mile. Filling in of sand to the depth of six to seven inches at or about Nelson would lessen the capacity of ditch one hundred inches. The miners above in Ten-Mile reservoir the water. I have seen reservoirs at head of Ten-Mile; it was in 1867; this causes the water to back up, and in selling water by the head the slacking up causes us to lose a head for a day. If the water slacks at eleven o'clock a. m., and should not come down until evening, we lose the sale of it for all day. The flow of the water varied considerable while defendants were hydraulicing.
In the spring the water was very muddy, and in consequence
19 thereof we reduced the price of water ten cents per inch. Truett, who was the superintendent of the ditch, reported complaints of water being muddy, made by the miners, and after consultation we agreed to reduce the price of water. This mining on Ten-Mile has occasioned loss and extra expense to the plaintiffs; when they sluiced out the sand-gate the water of the ditch at the point of delivery was lessened ten to twenty inches. If the water was out from ten to twenty minutes it would affect the flow of the water. My superintendent made report to me of the loss of the sale of a head of water for ½ day, owing to the water flowing irregularly. The ditch will deliver at Last Chance from four hundred to four hundred and fifty inches of water. We have had to employ extra help on account of sand. It requires the ditch-tender to go to the sand-gate every twenty-four hours. If it was not for this sand coming down every twenty-four hours from Ten-Mile I could get along with one man less on the ditch.

The wages of one man amounts to one hundred and twenty-five dollars per month. There were the same number of men in 1871 as in 1870; as the ditch grows older it requires less men to tend it. The construction of ditch cost about eleven thousand five hundred dollars.

20 The trouble from sand is from about first of May to first of August. I have seen reservoirs up at the head of Ten-Mile. It was three years ago. The Helena water-ditch is from seventeen to eighteen miles long.

JERRY ROBINSON recalled:

There is an irregularity in the flow of water down Ten-Mile—a larger head after dark than in the forenoon. In September there was from thirty to forty inches difference in the flow of water between forenoon and evening.

Here the deposition of M. F. TRUETT was read in evidence:

Interrogation 1. What is your name, age, occupation, and place of residence?

Answer. Miles F. Truett; am thirty years of age; am by occupation probate judge of Lewis and Clarke County, and reside in Helena.

Interrogation 2. State if you are acquainted with the property known as the Helena water-ditch and Hydraulic Company's property; and, if so, who were the owners of it at the commencement of this suit?

Answer. John S. Atchinson and Harriett Truett.

21 Interrogation 3. How long had they owned it?

Answer. John S. Atchinson bought one quarter interest in 1867, and another quarter interest in 1869. My father and Plaisted purchased the property in the spring of 1866, in June, I think, and the present owners are the grantees and legatees of Truett and Plaistead.

Interrogation 4. What was the condition of the ditch at the time Truett and Plaistead purchased it?

Answer. There was considerable of the ditch constructed in sections from the head down to Nelson Gulch, and I think on this side of Nelson. The work had been done in sections. There were stretches of the ditch done and stretches that were not completed. I don't think there were over one or two flumes completed. The ditch had been surveyed to Helena at the time the Yaw Yaw and the Taylor and Thompson Company's ditches were running water into Helena.

Interrogation 5. State what work was done upon the ditch purchased by Truett and Plaistead by them after their purchase; and when was the same completed?

22 Answer. They completed the ditch entirely from the head to Nelson Gulch, cleaned out the work that had already been done down to Nelson Gulch, and entirely completed the ditch with the necessary flumes to run it to Dry Gulch. It was completed to Helena in 1866, and to Dry Gulch in 1867.

Interrogation 6. State the cost and the capacity of the several ditches?

Answer. The whole property cost about one hundred and seventeen thousand dollars. The upper or Helena ditch carries about 700 inches when full. The capacity of the Yaw Yaw ditch when full is from 2,000 to 2,500 inches. The capacity of the Taylor, Thompson & Company ditch is about 100 inches.

Interrogation 7. State, if you know, when the first mining was done by miners on Ten-Mile Creek.

Answer. I think that the first time any mining was done was in the

spring of 1867. I believe Foster and Sears went up there and made a discovery late in the fall of 1866. The spring of 1867 was the first time I ever heard of any mining being done there.

Interrogation 8. What, if any, effect has been produced upon the ditches of plaintiff by any mining operations from the time of
23 the completion of the ditches down to the present time?

Answer. I noticed no effect produced in 1866. I think the water began to be slightly mud'ied in 1867. It kept growing worse each year, and we were bothered considerably during 1868, by their reservoir flowing periodically, and from tailings flowing. In 1869 it grew worse. In 1870 it grew still worse, and in 1871 became insupportable. The effect produced was the filling up of the ditches more or less from the head to the mouth, and which had a tendency to rot the flumes.

Interrogation 9. Do you know when the defendants commenced mining on Ten-Mile?

Answer. I don't know. The first I knew of it was in 1868, when I went up there.

Interrogation 10. What was the condition of the ditch and flumes in the spring of 1871?

Answer. The Nelson flume, or flume crossing Nelson Gulch, was about half full of sand and tailings. The ditch was filled up more or less from there to town, and considerably more from there to the head. Some places it was filled from eighteen inches to two feet; in some places for from ten to 300 or 400 yards long.

24 Interrogatory 11. To what was that attributed?

Answer. In my opinion, it was in consequence of mining upon Ten-Mile.

Interrogation 12. Was there or not any additional expense entailed upon you in operating your ditches thereby; and, if so, what amount?

Answer. There was an additional expense cleaning out the ditch this spring, costing about five hundred dollars ($500.00) extra, and an additional expense keeping ditch-tenders on the ditch.

Interrogation 13. What was the character of the water as to its purity before the defendants commenced mining, as compared with its after condition?

Answer. In 1866 water could be used for washing and drinking, and was so used in Helena, and was perfectly clear. In 1871 the water was very muddy, and was not only unfit for washing and drinking purposes, but, in my opinion, was considerably deteriorated for mining purposes.

Interrogation 14. State, if you know, in what mode the defendants were mining.

Answer. They were hydraulicing and ground-sluicing; most all of them latterly have been hydraulicing.

25 Interrogation 15. How much water did they use in their operations in 1871?

Answer. They told me they were using all there was in the creek.

Interrogation 16. Did the use of that water by them in any way tend to diminish the quantity or quality of the water flowing into plaintiff's ditch; and, if so, to what extent, and what effect did it have upon plaintiff's ditch?

Answer. It deteriorated the quality and reduced the quantity to a considerable extent, so much so that we were at one time induced to lower the price of water. We were also obliged to construct a sand-gate at the head of the ditch and a sand-dam at Colorado Gulch to enable us to run the ditch, and without those

aids we could not have run the ditch. The sand-gate at the head we sluiced out once a day, besides being obliged to waste from ten to twenty inches of water at that date. My recollection is that we sluiced out about from two to three hundred cubic feet of sand every twenty-four hours. The reservoir at Colorado Gulch I have measured since the commencement of this suit. I find it one hundred and twenty-five (125) feet long by fifty (50) feet wide, and seven feet deep.

26 At the commencement of the suit it had only been running about a week, but had accumulated considerable amount of sand and tailings which had passed through at least three miles of ditch in order to reach it. The sand runs past the Colorado reservoir.

Interrogation 17. How much did you lower the price of water, and what did it amount to per day?

Answer. We reduced the price from eighteen ($18.00) dollars to nine ($9.00) dollars for each sluice-head. This was on the Yaw Yaw ditch.

Interrogation 18. What was the difference in value of the water of the upper ditch before being deteriorated in quality by mining operations on Ten-Mile and afterwards?

Answer. The difference was at least ten cents per inch in the price of water.

Interrogation 19. How many miles of fluming are there in the ditches of plaintiff?

Answer. About five miles.

Interrogation 20. What, if any, effect would be produced on that fluming by being flooded with tailings and sediment?

Answer. It would rot the flumes, spring the sides, and sag the bottoms.

27 Interrogation 21. What, if any, effect the reservoiring of the water by defendants has had upon the ditches?

Answer. It produced a flood of 30 or forty (40) inches of water more at one time of the day than it did at another, and as we were obliged to furnish water uninterruptedly it deprived us of the sale of that amount of water.

Interrogation 22. State what has become of the deed from George Merrill and others to Henry B. Truett?

Answer. At the time of the commencement of this suit it was mislaid, but I believe it is now among the ditch papers.

Cross-examination.

X-interrogation 1. Is the Taylor and Thompson ditch now used for running water by the Helena Water-Ditch and Hydraulic Company?

Answer. It has not been used for the last two years.

X-interrogation 2. Then it has not been damaged?

Answer. Not for the last two years.

X-interrogation 3. How do you know the first mining was done on Upper Ten-Mile in 1866 & 1867?

Answer. Only from what I have heard.

28 X-interrogation 4. You say you were not damaged in 1866?

A. I don't think we were.

X-interrogation 5. You say you were not damaged in 1867?

Answer. Only a small amount.

X-interrogation 6. You were damaged some in 1868?

Answer. We were, and were annoyed considerably by the reservoiring of the water.

X-interrogation 7. You say you were much troubled in 1869?

Answer. Not so much as in 1868 by the reservoiring of the water, but I think more by the tailings.

X-interrogation 8. How much were you damaged in 1870?

Answer. I can't state in dollars and cents what the damage was in 1870, but we were obliged to expend at last five hundred ($500.00) dollars more to clean out the ditch in the spring of 1871, by the increased amount of tailings in it.

X-interrogation 9. Was the water reservoired in 1870?

Answer. I don't know; I was not up there in 1870.

X-interrogation 10. Was the water reservoi'd by the miners in 1871?

Answer. I don't know; but think it was.

X-interrogation 11. Why should you think it was?

29 Answer. From the intermitted flow of the water.

X-interrogation 12. You say the damage became insupportable in 1871. What do you mean by this?

Answer. Without the building of sand-gates and necessary outlay of considerable money in the building of those sand-gates, and the flooding of them off, we would not have been able to run the ditch in my opinion more than two weeks.

X-interrogation 13. How many men additional did you have at work in 1871 over former years?

Answer. I think one additional ditch-tender over the year 1870, but we were obliged to keep the ditch-tenders on the ditch longer than we otherwise would have kept them, which really made more than the above difference.

Interrogation 14. You say you lowered the price of water on account of the deteriorated quality?

Answer. We did.

X-interrogation 15. Did you lower the price of water from the Yaw Yaw ditch or Helena ditch?

Answer. From the Yaw Yaw ditch.

X-interrogation 16. Does the mining on Upper Ten-Mile affect the water in the Yaw Yaw ditch?

30 Answer. It does in the spring of the year, but does not in the summer, after the water becomes low, except by having deposited tailings in the bed of the creek, which are washed down by water coming in below the head of the upper ditch, and by the sand which we are obliged to flood off from the sand-gates constructed on the upper ditch.

X-interrogation 17. Does not the mining in Nelson Gulch greatly fill the water of the Yaw Yaw ditch with tailings?

Answer. It does.

Interrogation 18. Does not Nelson Gulch water flow into Ten-Mile Creek below the Helena ditch?

Answer. It does.

X-interrogation 19. After the summer stage of water, does any water flow by the Helena ditch down to the Yaw Yaw?

Interrogation 20. How many inches of water in Ten-Mile, where the defendants mine in the summer season?

Answer. Sometimes more and sometimes less; it varies immensely. In June of 1871, there were from one hundred (100) to two hundred (200) inches.

X-interrogation 21. How far is it from the head of the Helena ditch to the defendants' mining operations on Upper Ten-Mile?

Answer. About fifteen miles.

31 X-interrogation 22. Is there any mining on the tributary streams

of Ten-Mile between defendants' mining operations and the Helena ditch?

Answer. None that I know of.

X-interrogation 23. How many inches of water flow from these tributaries into the main Ten-Mile, between the defendants' mining operations and the Helena ditch, in June?

Answer. From four hundred (400) to five hundred (500) inches; that was in June, 1871.

X-interrogation 24. Is this four or five hundred inches run in clear?

Answer. It is.

X-interrogation 25. When were you first troubled and damaged by the defendants' mining operations?

Answer. In 1868.

X-interrogation 26. Were you damaged any in 1867 by mining operations?

Answer. To a small extent.

X-interrogation 27. Did you ever notify defendants that they were damaging you prior to 1871?

Answer. Some of them we did. In 1868 we went up to see them in regard to reservoiring the water, and partly on account of tailings.

32 Interrogation 28. Were you interested in the subject of this suit when you gave your evidence before Judge Wade on the trial for a preliminary injunction?

Answer. I was not. I was one of the heirs of H. B. Truett, but it was understood between my father, my brother, and myself, that, on account of advances made to me in the State of Nevada, I was to relinquish all estate left by him to my mother, and after his death I made a deed to my mother, in 1869, for all my right, title, and interest in the ditch and other property.

The evidence here ceased on the part of the plaintiffs.

The defendants called the following-named witnesses, who testified as follows:

HANK CORMAN:

Reside on Ten-Mile; know Helena water-ditch; some time in March was hauling lumber on it, nearly a week; have lived close to the ditch for the last three years; have never paid much attention to the water in the ditch. All I know about the ditch is as to *to* the water running into it from the hill-side on the west side of the ditch. There is much decomposed granite which runs down into ditch, which looks
33 very much like tailings. I have been over the ditch a great many times. Last spring there was a small flume put up to run the water from a small gulch under the ditch; never saw but one. The soil is a kind of decomposed granite. Have been a miner. I saw water running down there from the hill-side—water and sand together—and the ditch was full; but whether it was full of ice or sand I do not know. There was ice there. This was in February.

Cross-examination:

This was when I was on my wagon, hauling lumber; did not get off to examine it.

PIERCE:

Reside at Nelson since August 12th, 1866; business, mining; know' ditch since Feb'y, 1865; have been buying water from it ever since it was built; had ditch rented; cleaned it out twice; had ditch six months in 1868–9; cleaned ditch in springs of 1868 & 1869. I cleaned ditch out, four (4) men in one day, from my place up three (3) miles, in spring of 1867. Below Colorado there is a place where four (4) men worked half a day. It is a flat place, and water runs in from the hill-side; spring of 1869 put my men on ditch—four (4) men one day and a half. The company would not accept it. I told the company to take fifteen (15) men and clean it. They took five
34 (5) men one day and a half, and completed the cleaning. There was no sediment except the places where there was no grade. All I cleaned out was from the sides and hills. In 1869 used water from ditch; bought water during summer of 1870 for mining; for using and drinking purposes have used it right along. Observed ditch almost every day in the year. I saw them cleaning ditch in spring of 1870; very little sediment. In 1867 & 1868 there was as much sediment in it as to-day. There is now about one inch in flume. The flume settled in centre of gulch the first time water was let into it, and what sediment there is settles there. Last Sunday there was not an inch of sediment in the flume. In spring of 1871 they shoveled out sediment. Two men shoveled it out in one-half day. It is customary to clean out water-ditches every spring. The sand and the sediment came from the side of the hill. I saw the ditch run full one time in February last from the side of the mountain. The character of the hill-side is numerous gulches and ravines. I have used water from ditch ever since it was built. In August 12th, 1866, the water was clear. It is not clear now, but we use it every day, and my wife uses it. It has been riley since the last
35 three years. It is not riley enough to injure it. [I was mining there in 1865; twelve (12) men mining in my party.]

(Subject to objection.)

Twelve (12) to fifteen (15) inches run down by the mouth of the ditch in the spring; water would have to run five (5) miles. No sediment in the creek now; none of the boulders are covered up. The miners use about one-fifth ($\frac{1}{5}$) part of the water that runs into Helena ditch. Mining up at head of Ten-Mile does not injure the water in ditch for mining.

Cross-examination:

In 1866 water was clear; when ditch is new it caves in more than after getting older. I do not pretend to say that the sand in the upper sand-gate shouldn't come from the hill-side. It came down the stream. Mining in 1865; was in Montana Gulch Feb'y 15th, 1865; left July 3rd, 1865; water after flood was clear in 1867. The water is clearer this fall than for the last three years. It was riley in 1868; same in 1869; same in 1870, 1871. It was riley at times and pure at times. Always riley during May, June, and July ever since I knew the stream. Sediment will be carried further and further each year. The streams and stones become coated over.

JOHN RODGERS:

Reside in Helena since 1867; was on Ten-Mile in 1867; mined there below the forks of Monitor and near Ten-Mile. There
36 were four (4) companies mining there then; know Helena ditch. From where there was mining to mouth of ditch is sixteen (16) miles. In 1867, 1868, & 1871 worked on the ditch considera-

ble. In June and July of 1871 camped on ditch for two weeks and used water from ditch. The water was very little riley; we used it for drinking and cooking. It is good for mining purposes; perfectly good. Examined ditch the 9th day of this month from the head of it to Colorado Gulch; found no sediment or dirt. Head of ditch, for first two miles, runs through valley; then runs on to side hill of decomposed granite. Granite on side hills very soft; no soil; some places it is steep above the ditch. There are numerous sinks and small ravines along the side hill. It is frequently the case that there are sand-gates. The water is riley in the spring. I cannot tell the amount of sediment. There was a number of beaver-dams. I have examined dams; no dirt in them. Sand-gate at head of ditch is three feet deep; five (5) or six (6) feet high. Gate fifty (50) yards from head of ditch. I examined down waste-way for sand; did not find any; don't think there could be five (5) feet of sand along flume out at the gate. In the spring of the year it is dangerous to cross Ten-Mile. It is full of boulders and thousands
37 of inches come down. I think water would clear itself in running five (5) or six (6) miles. Five-sixths (5/6) of water of Ten-Mile runs into it below the mining. The water that runs in is usually clear. Saw-mill yard runs down the stream.

THOMAS CONNOR:

Reside in Helena; have been mining off and on since 1864; I saw two companies mining at head of Ten-Mile, in 1866; one company was sluicing and the other ditching; this was in August; two or three men went up with me; I went up again last spring, from April to July; by the crooks and turns of the stream it is twenty (20) miles from ditch to where they are mining; four or five streams run into Ten-Mile, below the mining; two streams about as large as the main stream. None of these defendants were then mining, to my knowledge.

J. C. WILLIAMS:

Reside in Last-Chance; mining; foreman of mine; used water last summer from Helena ditch; it was clear water; used this water from early in the spring to August; have known water since 1867; commenced mining about the 10th of May; have used this water for mining since 1867; can see but little difference in it for three (3) years.

Cross-examination:

38 Water might be a little colored.

A. G. GETCHELL:

Reside quarter of mile below the town; business, mining; work on No. 7 & 8; use ditch water; upper ditch; it is good water; what I would term clear water; clear as any ditch water I ever used; have used water ever since it came into the ditch; never saw any difference in the water in the different years; it is first-class water; sometimes drank it.

Cross-examination:

It is what we would term clear water; it might be tinged a very little; never discovered any sediment in it.

Examination in chief:

Mined since 1854; water is good for cleaning up and riffling.

W. R. DEWER:

Reside quarter mile below town; I mined on Upper Ten-Mile in 1866; three companies where I was, and several more above; I mined on Monitor Gulch in July and August; between eighteen (18) and twenty (20) miles by the stream from ditch to head of Ten-Mile; one hundred (100) inches used for mining where I was then; have used water here; the water is clear; they sell it for such; none of the defendants were mining there in 1866; the 18 or 20 miles is guess-work.

JAMES HUMPHREYS:

39 Miner; reside in Helena; have been mining for Williams; have been working on bed-rock and dumping; used Helena ditch water; the water is clear as any I have ever seen for mining purposes; I mean clear water for mining purposes; I never have seen any sediment in it; I never saw any clearer water for mining purposes; I used water for cooking.

JOHN CARPENTER:

Reside in Helena; have been a miner since 1856; I mined on Upper Ten-Mile this season; used second head of water; it ran two hundred (200) yards before we used it; we used it for hydraulicing; summer stage of water about first of July 50 to 60 inches; mining in stream at Upper Ten-Mile; earlier 500 or 600 inches run there; from this mining to ditch it is 18 or 20 miles by the stream; when the water first leaves the mines it is muddy for a couple of miles; from six miles down it is nearly clear; stream is full of boulders, and is very rapid; 10 miles down the water is comparatively clear; 15 miles down it is clearer—as clear as any mountain stream; in high water, stream ¾ of amount in stream comes in below the mines; the tributaries are clear below the mines, except one; water running; Mr Travis fell' timber in creek
40 and corralled them right there and made a dam; the others took the water from there and carried it into a ditch; used it and dumped the tailings 200 yards from stream; no reservoiring there this summer when I was there, up to July; it froze nights about the first day of September, of this year; Peterson has what they call a reservoir; it does not hold water; dam might be 50 feet long; 7 to 9 feet high; flowsback 50 feet.

What effect does mining upon Upper Ten-Mile have upon the Helena ditch?

What effect would mining at Upper Ten-Mile have upon the waters of the stream at mouth of ditch?

What effect would such water have upon the ditch, in running through the ditch?

Water that will puddle a ditch in the first instance will fill it by running in it long enough. I don't think there is anything running at head of ditch that would accumulate. Never saw water at head of ditch. When I first went to work on Upper Ten-Mile, the lowest amount of water was scarcely anything. The highest amount was 600 inches. In July, 50 to 60 inches; Anderson's is the lowest hydraulic claim; Peter-
41 son's next, Travis' next on Ten-Mile, Hanson next on Monitor, next McClellen, next Riley, and some more, I guess. Don't know as they cribbed any tailings at Anderson's; Peterson run out on a bar 200 yards from stream. Travis fell' timber and his dam will catch tailings and dam the water. Travis delivered the water to Peterson. Travis has clear water for the pipe; no one working above him. How far tail-

ings will go in a stream depends upon circumstances; as the stream becomes filled and smoothed on the bottom they will.

HOLLY HANSON:

Miner since 1859; know creek; know ditch; passed over creek once, up and down, in spring of 1869. Have been at head of ditch. At the time I was there the water had a bright stream; examined ditch for ½ mile. Took a shovel along and examined ditch. Could not find any sediment. Examined sand-gate; it was completely clean. This was eight o'clock in the morning; could not see any sand below gate ¼ mile down gulch to Ten-Mile. It is a dry place. Sand-gate is a box 3 or 4 feet high, 3 feet wide. Examined ditch below sand-gate ¼ mile.

W'M NICHOLSON:

Miner since 1865. Mined on Upper Ten-Mile in 1869. Up and down stream once. Know Helena water-ditch since 1869; examined
42 ditch; some portions of ditch one week ago to day. Took shovel and searched for sand and sediment, could not find any sediment except the regular cavings. The ditch for ½ mile runs through decomposed granite, then goes on side-hills; sandy; examined sand-gate, 3 or 4 feet long, 3 or 4 feet deep. I noticed some small quantity of sand below the gate. Slight coating on the bottom of the reservoir. From head of ditch to Peterson's mining-claim is 15 or 16 miles. The miners of Ten-Mile in 1869 used about ⅛ of the water of the stream. The character of the water running into the stream below the mining was clear.

[Effect of mining would have very little effect upon the water at mouth of ditch, and would have no effect upon ditch.]

(Excepted.)

As the bed of the stream becomes filled, sediment will be carried further each year. Some light sand might come from the mining into ditch.

JOSEPH DAVIS:

Reside in Helena; am miner; in Last Chance for 3 or 4 years. Used water from Helena ditch; very good water for mining. So far as its being riley is concerned, it does not injure it any at all. I should not know there was any mining on Ten-Mile from character of water.
43 Have observed no material difference in water from year to year. Have used first head this summer. Second head is pretty thick; very suitable for ground sluicing; water riley would not be, and think is not so good for cleansing bed-rock.

JAMES SIMPSON:

Reside in Helena; the present time, occupation, mining; mined on Ten Mile from 1867 to this time; all kinds of mining, hydraulicing, ground sluicing, and drifting. Have been up and down Ten-Mile hundreds of times; know ditch; crossed it hundreds of times; have examined it for sediment this summer and last. The water is usually clear, excepting in the spring. It is clear enough for drinking, mining, or any purpose. Water in Ten Mile is good for drinking. The stream is full of boulders, brush, beaver-dams, and everything. The character of the water of the stream July last, 15 miles below the mines, is pretty muddy; ten miles below is pretty clear; at the ditch, is perfectly clear, except in the spring. Examined ditch 300 yards below sand-gate. The water running into

ditch would have no effect upon the ditch. First mile and a half of the ditch runs through valley, level; it then reaches the foot-hills and decomposed granite hill; very steep in places. This decomposed
44 granite is full of cracks. When muddy water reaches these cracks it fills them. Many rains last May and June; was reservoired a little in 1870; more in 1871; 15 streams put in below the mining; we use one-tenth of the water of the stream; high water from middle of May to the middle of June; last June stream was so high you could not cross with a horse.

Cross-examination:

Went up to Ten-Mile Aug. 15th, and stayed there when the water froze up; four companies there; 1868, five companies pipeing; 2 companies in Monitor, ground-sluicing; 1869, about the same number; in 1870, four pipes running; in 1871, seven or eight pipes running. Don't know as muddy water will rot flume faster than clear water.

EDWARD CUNNINGHAM:

Reside in Last Chance. Worked on Williams' claim in July last. Worked there on the dump. The water came from Helena ditch. It was good water for mining; it is first-class water for mining purposes.

GEORGE MAXWELL:

Reside in Last Chance. Worked on Taylor and Williams' claim last summer, on the dump. Used Helena ditch-water. It was good,
45 clear water. The first week in the spring it was pretty riley. when it was first turned into the ditch. The water, when it first comes into the ditch, for two or three days, is riley. I have panned with the water, and called it good for that purpose.

O. ALLEN:

Mined past season; mined on No. 6 & 7 in Last Chance; worked on dump to May. Water was good, clear water; I called it. I worked there 4 weeks. Did not see any material difference in the water. Used water in 1868, 1869, & 1870. Could not see any difference in the water this year from the other years.

CHARLES CUNNINGHAM, J'r:

Reside in Last Chance. Mined in Last Chance last summer. Used Helena ditch-water from 8th day of May to latter part of July. I would call the water clear; it might have been riley, but I did not notice it. I noticed water most every day.

LEWIS DAVIS:

Reside in Last Chance. Have mined here since 1866. Have used Helena ditch-water since 1868. Water clear for mining purposes. In the spring of the year it is slightly discolored, but at other times it is clear; first head of water.

46 P. T. WILLIAMS:

Reside below town, about ¼ of mile; agent for Helena Ditch Company; selling water; has been slight deductions from year to year since 1867. In 1867 it was 75 cents per inch; 1868, slight reduction. In 1869 it was 50 cents. In 1870 it was 40 cents. In 1871 it was 20

cents day-time and 20 cents nights; day and night, 30 cents. It was not lowered in 1871 on account of water being muddy.

Cross-examination:

The company fixes the price of water. It has bothered us a little each year, and each year it has grown a little muddier. Thompson once made a complaint last summer.

GEORGE TRAVIS:

Am defendant; have mined since 1864; have mined in Upper Ten-Mile since 1868; know ditch; travelled up and down stream a dozen times every season; use ¼ of water of stream. Below mining 15 streams put into stream; all clear except in spring. I crib my tailings constantly. The other companies dump out on the bars, and not into the main stream. I did not reservoir any water this season during the mining season; had conversation with Truett and Dahler in 1869.
47 They came up to see about our reservoiring the water. Mr. Atchinson was along. They went to Simpson's reservoir. Dahler said the thing had been misrepresented to us. "The reservoiring does not injure us. Go ahead." They were up this season; from head of ditch to mining, 15 or 16 miles; five miles below, riley; 10 miles below that, colored; head of ditch clear as any brook-water that runs, except in spring. Ditches have to be puddled every spring; [bed-rock flume 2½ miles below my mining.]

(Excepted.)

Examined ditch week ago to-day. I call the water clear water at mouth of ditch, clear as any brook water; ditch runs through level ground for 1½ mile; then runs into the foot-hills. Crossing the flat there was no sediment, and none until it reaches the hills; examined Nelson on Sunday last; measured sand; no water in flume; one inch and a half of sand; 2½ miles to Nelson, one mile further to Colo[illegible]; extent of mining on Upper Ten-Mile, eight companies; valu[illegible] my mine, $20,000.00; other companies, not quite so valuable, on account of my getting the water easier; my improvements' value, $7,000 or $8,000; Simpson's, same or a little more.

Cross-examination:

48 Six pipes running in 1868 besides what there was on Monitor; in 1870, same, and these in Monitor; five pipes on Ten-Mile; 2 on Monitor, and some ground-sluicing. Three companies used pipes, and ten ground-sluicing; 5 pipes in Ten-Mile. I cribbed my tailings all I possibly could. Mr. and Mr. , above me, crib theirs. Peterson dumps on a bar. Dams could be built so as to crib the tailings. By building dams and permitting water to back up and settle, the sediment would settle. I make a tight dam by throwing trees tight. The mines are from half a mile to one mile and a half apart. I have clear water for piping. I have reservoirs, one put up since, 4 in all; no reservoiring this year before October. Then there was a little for cleaning bed-rock; none in September, to my knowledge. I think Cullen reservoired a little in June, July, or August, might have been in middle of September; no recollection of seeing Peterson reservoiring there in 1870. We use 150 to 200 inches to a head. At the highest stage, when we are mining, 800 to 1,000 inches is the highest stage of water; about ¼ of water at Helena; ditch comes down from where we are mining. I consider the water for the ditch is benefitted by our mining. I think sediment does not rot flume;

49 value ground at $20,000.00, with improvements. Simpson sold out ¼ interest of his ground for $2,000.00.

W. I. SNAVELY:

Reside in Last Chance Gulch; been miner twenty-two years; worked on Taylor's claim last summer; worked on the dump along in April, May, and June; used water out of upper ditch; water was very good; it was a little riley; used it for drinking; when the ditch is tapped to bring water to the mining claims, it runs down a steep hill, and naturally makes the water a little riley; three years ago the water was muddy from their working on it, or cattle going over it. Have used water for last five years; for the last three years there has been no difference in character of water.

Cross-examination.

First used the water direct from Helena ditch in 1868; the water was riley in the spring; sometimes the water was perfectly clear, and sometimes muddy; have seen cattle standing in ditch for hours; this as to the lower ditch.

ROBERT LAWRENCE:

Reside on Rodney street; know Helena ditch; runs in an alley back of the house, 20 feet therefrom. It is good water; we use it for washing and cleaning purposes, not for cooking; it is generally clear. Have lived here, and observed the water for three years; have not observed any difference in character of water.

50 ED. JEAN:

Reside in Nelson Gulch; been there since April 15th, 1870; know flume; have observed flume to see sediment; I saw it in November one year ago; Robinson turned water out of flume; I don't think there was over four inches of sediment in the flume at the deepest place, near the end.

Cross-examination:

Sediment extended out into flume 20 feet. In 1871 saw Truett shoveling sediment out this side of flume.

In chief:

Never have noticed any amount of sediment except where road crosses the ditch.

REBUTTING.

P. T WILLIAMS:

Have been mining since 1850. I examined water in stream last spring, opposite mouth of ditch; it was riley in the spring; examined it again in August; it was quite riley; went up to see about building sand-gate.

Cross-examination:

Pretty well colored; table-spoonful of sand in shovel-full; water failed a little in consequence of having the gate pulled up to wash sand out.

W. A. CHESSMAN:

Have mined twenty-one years; my experience is that sediment will be carried as far as water runs.

Cross-examination:

Should rather have clear water run in a ditch than muddy;
51 muddy water tends to rot flume.

GEORGE MAY:

I have been up and down Ten-Mile in June; subsequently I went up again; observed it several times; I could not observe any difference in the character of the water from Clarkson down to head of ditch; have been in mining countries; in California in 1854.

(Hypothetical case put.) Sediment would be carried many miles and below the mouth of the ditch.

And after argument of counsel, the court rendered the following opinion in writing, which was filed in the said action:

HELENA DITCH COMPANY
vs
TRAVIS, PETERSON, ET AL. } Suit for injunction.

This suit is brought by the owners of the Helena Water-Ditch Company against the defendants for an injunction to restrain the mining operations on the Upper Ten-Mile Creek. The plaintiffs' ditch taps the creek about fifteen miles below the mines of the defendants on the same stream, and the plaintiffs claim to be the prior appropriators of the waters of the creek, or so much thereof as is necessary for the purposes of the ditch, and that the mining operations of the defendants injure and damage the waters of the stream and the ditch of the
52 plaintiffs. The testimony establishes the fact that the plaintiffs commenced their ditch in November, 1864, and continued work thereon until July, 1865, expending within that time about $23,000.00 thereon, and completing two-thirds of the digging required to complete the ditch, when their money failed and their work suspended. No more work was performed on the ditch until August, 1866, but the company continued in possession and claiming the ditch until August, 1866, when they sold the same for $4,000.00, and work thereon was resumed, and the ditch completed and put in operation in 1867. There was no abandonment of the ditch within the meaning of the law, for when the work was suspended there was no intention to abandon, and the subsequent sale for a valuable consideration showed the property to be valuable, and there was in fact no abandonment of possession. The testimony further shows that in 1865 there was mining on the Upper Ten-Mile for two or three months on a small scale in 1865, but there was no continuous mining there until 1867, and to this time, and the proof is not satisfactory as to the continuation or extent of the mining. The plaintiffs are clearly the prior appropriators of the waters of the Ten-Mile Creek, to the capacity of their ditch as against the defendants, and as such are entitled to the unobstructed use and flow of the water.

53 2. The plaintiffs' right to bring this suit is not barred by the statute of limitations.

3. The only remaining question, and upon which the fate of this case depends, relates to the injury and damage to the plaintiffs and their ditch and the waters thereof, in consequence of the mining operations of the defendants. The volume of the waters of the stream is increased by tributaries flowing into it between the head of plaintiffs' ditch and the mines of defendants from 15 to 18 miles above, about five-sixths; that

is to say, the stream where plaintiffs' ditch taps it is about six times as large as at the point where the mining operations of defendants are carried on. If twelve hundred inches of water flow down the stream opposite the head of plaintiffs' ditch, 200 inches thereof, or in that proportion, would come from the Upper Ten-Mile at the point where the defendants are mining. The tailings of the defendants are cribbed, and this 200 inches of water, after having been used for mining several times, flows down the stream for fifteen to eighteen miles to the head of plaintiffs' ditch; but before reaching that point it is mixed with ten hundred inches of pure water, and in this condition it enters the ditch of plaintiffs. It then flows through the ditch for thirteen miles and is used for mining purposes in Last Chance Gulch. It is admitted that the mining of defendants does not diminish the flow of the waters
54 of the creek, and the testimony is entirely conclusive upon the proposition that the water, after reaching the mines of Last Chance, where it is used, is first-class water for mining purposes, and that it is not diminished in quality or quantity at that point. Then, the only remaining question relates to the injury and damage to the ditch caused by the flow of this water through it. There is abundance of testimony tending to show that the water will become clear after having been used for mining in flowing five or six miles, while upon the other hand there is proof going to show that riley water will never become pure as long as it is in motion, and this latter view is the most satisfactory, and I have not much hesitation in saying that the waters of Ten-Mile Creek, at the point where the plaintiffs' ditch taps the same, are discolored, and carry a certain amount of sediment in consequence of the mining of defendants. Before this mining commenced the waters of the creek were pure.

Now let us examine the extent of the injury to the ditch. The water is not injured, as we have already shown. Then the only injury that could result is in filling the ditch, and in constructing and tending the necessary apparatus to keep the sand and sediment from entering the same. The ditch has to be cleaned each spring and did before the mining of defendants commenced, and it is not very satisfactorily shown that the
55 cleaning required any considerable more labor since the mining than before. Certainly the flow of the water has not been materially obstructed since this mining commenced. But the proof shows this fact, that the plaintiffs have been compelled to construct a sand-gate or reservoir to catch the sand and sediment, and that this during the mining season fills every twenty-four hours, and that the waters of the ditch have to be used for from ten to twenty minutes each day in cleaning this gate or reservoir, and that one man's services are necessary for that time to clear the sand and sediment from the reservoir. The testimony shows that the ditch is divided into three sections, and that the services of one man to each section is constantly employed, and was before there was any mining on the creek, to keep the ditch in running order. Mr. Atchinson thinks that two men might probably attend to the ditch if it was not necessary to tend the sand-gate. Then the extent of the injury and damage is reduced to this: The construction of a sand-gate; the use of the water ten minutes each day to wash and cleanse it, and the services of a man for that length of time, who is necessarily employed in other services on the ditch, and is not especially there for the purpose of tending the sand-gate, but is on the
56 ditch for general services, working by the month. Does the case come within the range of the decisions cited in the California Reports? Let us examine these cases. In the case of Hill vs. Smith,

27 California, page 480, the defendant had been engaged for four weeks in digging up the bed of a creek at points from 600 to 1,000 feet above the head of the ditch, and washing down the earth and water into the ditch, thereby mixing the earth and mud with the water, and that in consequence thereof the sales of water were injured, and the use of the mines destroyed. Where the plaintiff had previously sold only 60 inches of water she was compelled to sell 120 inches at the same price, in consequence of the deterioration of its solvent capacity, by reason of the sediment and mud from defendant's mining claim, and that some of the mines quit work entirely in consequence of the muddy water. Is this case parallel in any sense to the case at bar? Here the mining was only 600 to 1,000 feet from the head of the ditch, while in the case under consideration it is at least fifteen miles away, and a large volume of pure water mixes with water from the mines before reaching the ditch. The case in the 23rd California, page 480, Phœnix Water Company vs. Fletcher, shows this state of facts: The plaintiffs were the prior appropriators of the waters of the stream, and had constructed a ditch for mining purposes. The defendants erected a dam
57 across the stream above the plaintiff's ditch for the purposes of a saw-mill, and caused the waters to flow irregularly, at times holding it back, and suffering but a small quantity to flow to plaintiff's ditch, and at other times letting it down in greatly increased quantity, and that the saw-dust and refuse bark of the saw-mill is thrown into the stream by the defendant, clogging and filling the plaintiff's ditch and reservoirs, and thereby diminishing their capacity to flow and hold water, and that thereby serious injury was caused to the plaintiffs. The exact nature and extent of the injury is not stated, but it may well be supposed that the irregularity in the flow caused by the mill and dam of defendants was the chief source of damage, as that was one of the principal points decided in the case; and as to this point the doctrine in the case of the Bear River and Auburn Water and Mining Company vs. The New York Mining Company, 8th California, page 327, that the first appropriation of water for mining purposes is entitled to have the water-flow without material interruption in its natural channel, is approved and confirmed. In the case under consideration there was no material, if any, interruption in the flow of the stream, and no complaints from the miners for irregularity in the supply of water
58 from the ditch. The doctrine that the first appropriator of water for mining purposes is entitled to the waters of a stream, as against subsequent appropriators, without material interruption in the flow thereof, or in quantity or quality, is fully recognized. This proposition has been too long established in this mining region to be now called into question, and I apply this doctrine to the case in hand. The water at Ten-Mile Creek, at the place where it enters plaintiffs' ditch, is first-class water for mining purposes. It is of the same quality when it reaches the mines of Last Chance, and the only damage to plaintiff in consequence of the mining of defendants is the work of one man for from ten to twenty minutes each day, and the use of the waters of the ditch for that length of time; and this service is performed by a man working by the month, and his pay is not thereby increased. This sand-gate is effectual in its operations, and the task of cleansing the ditch each spring is not materially increased in consequence of the mining above. Then it only remains to say that the nature and extent of the injury complained of is not such as would authorize or justify the granting of the injunction prayed for. Mining upon Upper Ten-Mile will cause the waters of the stream to be discolored, and to carry

a certain amount of sediment for many miles below plaintiffs' ditch, and to grant the injunction would necessarily cause the defend-
59 ants to cease mining. There is one consideration: the defendants are shown to be responsible for their acts. Their mining claims are shown to be worth from fifteen to twenty thousand dollars each, and this testimony is not disputed, and there is no testimony tending to show the insolvency of defendants, and for the purposes of this case they must be taken to be solvent and responsible. The office of an injunction is to prevent an irreparable injury, and it is not applicable to those cases where the parties have an adequate remedy at law. In this case, if the defendants have injured the plaintiffs, a suit for damages would be the appropriate remedy, as they are able to respond in damages. One thing further: It would require a very strong case for an injunction, to justify the granting thereof, when such an act would cause infinitely more damage than it would remedy. And this is the case at bar.

The injunction is refused.

And that on the 25th day of November, A. D, 1871, judgment was entered in the said action, which is as follows, to wit:

In the district court, third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke.

60 *Judgment by court.*

JOHN S. ATCHINSON, MARY L. ATCHINSON, AND Harriett Truett
vs.
PETER PETERSON, GEORGE TRAVIS, JOHN Anderson, W. H. Phelp, W. Fay, M. Monroe.

This cause came on regularly for trial on the 25th day of November, A. D. 1871, Chumasero & Chadwick, esq'r's, and Toole and Toole, esq'r's, appearing as counsel for the plaintiffs, and G. G. Symes, esqr. and J. H. Shober, esqr., appearing for the defendants. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court sitting without a jury: Whereupon the respective parties called their witnesses and other evidence; and the evidence being closed, the cause was submitted to the court for consideration and decision; and after due deliberation thereon the court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Whereupon, by reason of the law and the findings aforesaid, it is ordered and adjudged that the said defendants herein do have and recover of and from the said plaintiffs herein their costs and disbursements
61 in said action incurred, amounting to the sum of five hundred and four dollars and fifty-five cents, (504.55.)

Judgment rendered November 25, A. D. 1871.

Clerk's costs .....
Sheriff's " .....
Witness' " .....

And that upon the said 25th day of November the said plaintiffs gave their notice of intention to move for a new trial, which is in the words and figures following, to wit:

In third judicial district court, Lewis and Clarke County, Montana Territory.

JOHN S. ATCHINSON ET AL.
vs.
P. PETERSON ET AL.

And now comes the plaintiffs and give notice of motion for a new trial in this cause on the following grounds: 1st. Insufficiency of the evidence to justify the findings and decision of the court. Error in law occurring at the trial, and excepted to by the plaintiffs.

CHUMASERO & CHADWICK, & TOOLE & TOOLE,
Plaintiffs' Attorneys.

Received copy November 25th, 1871.

SYMES & SHOBER,
Defendants' Attorneys.

Territory of Montana, third judicial district, county of Lewis & Clarke, & Territory of Montana.

JOHN S. ATCHINSON ET AL.
vs.
62 P. PETERSON ET AL.

And now comes the above-named plaintiffs and move the court to set aside the judgment herein entered, and for a new trial, upon the ground that the court erred in its findings of fact and conclusions of law; and that said findings of fact are against the evidence; and that said judgment is against law and evidence. And the said plaintiffs assign as errors:

1st. That the said findings of fact by the court are not supported by the evidence. And—

2nd. That there is error in the conclusions of law. And—

3rd. That the court erred in refusing to grant the injunction prayed for, and in ordering judgment to be entered for the defendants.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

I, D. S. Wade, judge of the third judicial district court of the above-named Territory, do hereby certify that the foregoing statement on motion for a new trial is correct.

Dated March 22nd, 1872.

D. S. WADE, *Judge.*

And on the 28th day of March, 1872, the cause coming on to be heard upon the motion for a new trial, the following order was entered therein:

63 In third judicial district court, Lewis and Clarke County, Montana Territory:

JOHN S. ATCHINSON & OTHERS, PLAINTIFFS,
vs.
PETER PETERSON & OTHERS, DEFENDANTS.

This cause coming on to be heard on the motion of the plaintiffs for a new trial herein, and the statement having been duly settled in the

case, and the court having been fully advised, it is ordered that the said motion for a new trial be, and the same is hereby overruled for the following reasons, to wit:

That no errors in law appear from the record to have been committed on the trial.

That the findings and judgment of the court are not against the evidence or law of the case.

That there *is* no legal objections appearing, sustained by the record, for which a new trial should be granted.

D. S. WADE, *Judge.*

And on the 17th day of April, 1872, the plaintiffs herein filed their notice of appeal, which is as follows, to wit:

In the district court of the third judicial district of the Territory of Montana in and for the county of Lewis and Clarke:

64 *Notice of appeal.*

JOHN S. ATCHINSON ET AL., PLAINTIFFS,
vs.
PETER PETERSON ET AL., DEFENDANTS.

You will please take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of this Territory from the judgment therein made and entered in the said district court on the 25th day of November, A. D. 1871, in favor of the defendants in said action, and against said plaintiffs, and from the whole thereof; and also from the order of the court overruling plaintiffs' motion for a new trial.

Dated 17th day of April, A. D. 1872.

Yours, &c.,

CHUMASERO & CHADWICK,
Attorneys for Plaintiffs.

To the clerk of said district court, and G. G. Symes and J. H. Shober, attorneys for defendants.

Service of copy admitted April 17th, 1872.

G. G. SYMES & J. H. SHOBER,
Att'ys for Def'ts.

And on the 18th day of April, 1872, the plaintiffs herein filed their undertaking on appeal, which is as follows, to wit:

In the district court of the third judicial district of the Territory of Montana in and for the county of Lewis and Clarke:

65 *Undertaking on appeal.*

JOHN S. ATCHINSON ET AL., PLAINTIFFS,
vs.
PETER PETERSON ET AL., DEFENDANTS.

Whereas the plaintiffs in the above-entitled action have appealed to the supreme court of the Territory from a judgment and order made and entered against them in said action in the said district court, in favor of the defendants in said action, on the 25th day of November,

A. D. 1871, for five hundred and four dollars and fifty-five cents, costs of suit, and from the order of the court overruling motion for new trial in said cause:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, S. T. Hauser, of the county of Lewis & Clarke, by occupation a banker, and P. T. Williams, of said county, miner, do hereby, jointly and severally, undertake and promise, on the part of the appellants, that the said appellants will pay all damages and costs which may be awarded against them on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves, jointly and severally, bound.

And whereas the appellants are desirous of staying the execution of the said judgment so appealed from, we do further, in considera-
66 tion thereof and of the premises, jointly and severally, undertake and promise, and do acknowledge ourselves, jointly and severally, bound in the further sum of one thousand and ten dollars, being double the amount named in the said judgment, that if the said judgment, &c., appealed from, or any part thereof, be affirmed, the appellants shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellants upon the appeal.

Dated April 17th, A. D. 1872.

S. T. HAUSER. [SEAL.]
P. T. WILLIAMS. [SEAL.]

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

P. T. Williams and S. T. Hauser, the persons named in and who subscribed the foregoing undertaking as sureties thereto, being severally duly sworn, each for himself says that he is worth the amounts specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

P. T. WILLIAMS.
S. T. HAUSER.

Subscribed & sworn to before me this 17th day of April, A. D. 1872.
WILLIAM CHUMASERO,
Notary Public.

67 TERRITORY OF MONTANA,
County of Lewis & Clarke:

I, H. P. Wade, clerk of the district court, third judicial district, in and for the county aforesaid, do hereby certify that the foregoing 100 pages, numbered from 1 to 100, contain a full, true, and correct transcript of certain proceedings, orders, and pleadings had, made, and filed in said district court in the cause of John S Atchinson et al. against P. Peterson et al.

Witness my hand and the seal of said district court this 17th day of July, 1872.

[SEAL.]

H. P. WADE, *Clerk.*
By ALEX. H. BEATTIE, *Deputy Clerk.*

Filed August 12th, 1872.

I. R. ALDEN,
Clerk Supreme Court of Montana Territory.

68 In supreme court of Montana Territory, August term thereof, A. D. 1872.

JOHN S. ATCHINSON, MARY L. ATCHINSON, and Harriet Truett, plaintiffs & appellants,
vs.
PETER PETERSON, GEORGE TRAVIS, JOHN Anderson, W. H. Phelp, W. Fay, and M. Monroe, def'ts & respondents.

Be it remembered that on the 12th day of August, anno Domini 1872, the above-named appellants, by their attorneys, Messrs. Chumasero & Chadwick, filed in the office of the clerk of said supreme court their transcript of the record of the proceedings had in the above-entitled cause in the third judicial district court of said Territory, sitting in and for the county of Lewis & Clark; and the said cause was duly entered for hearing on appeal at the said August term of said supreme court.

And afterwards, to wit, on the nineteenth day of August, A.
69 D. 1872, the said appellants, by their attorneys, Messrs. Chumasero & Chadwick, filed herein their argument, points, and authorities, of which, in words and figures, the following is a copy, to wit:

In supreme court, Territory of Montana, August term, A. D. 1872.

JOHN S. ATCHINSON ET AL., APPELLANTS,
vs.
P. PETERSON ET AL., RESPONDENTS.

Points & authorities of counsel for appellants.

This suit was commenced by a bill in equity, setting forth that the plaintiffs were entitled to the use and enjoyment of the waters of a certain stream of water known as Ten-Mile Creek, situate in the county of Lewis and Clarke, and Territory of Montana; that they were entitled to such water by virtue of prior appropriation made by their grantors and predecessors in interest; that they and their predecessors in interest constructed a ditch for the purposes of conveying the water of the said stream to valuable mining-ground in Last Chance Gulch, said county; that such ditch was constructed at a cost of one hundred and seventeen thousand dollars; that, after the construction of the said water-
70 ditch, and the appropriation of the water of the said stream, the defendants went above the head of said ditch, on said stream, and commenced mining, and, by means of hydraulic mining, washed down into and through the plaintiffs' ditch large quantities of sand, sediment, and tailings, thereby filling the same up, and putting the plaintiffs to great trouble, cost, and expense in keeping the ditch clear of such sand and sediment, and also greatly deteriorating the water in quality; and the said plaintiffs prayed for a perpetual injunction. The defendants, by their answer, denied the prior appropriation, and also the injury to the plaintiffs.

The cause was tried before the court without a jury, and the chancellor filed his opinion and decision in writing.

The chancellor found from the evidence that the plaintiffs were the prior appropriators of the water of Ten-Mile, and were entitled to the use and enjoyment thereof.

The chancellor further finds from the evidence that the water is not injured by the mining on Ten-Mile, and that such mining does not deteriorate the water for mining purposes. The appellants, upon the trial, did not urge the point of the injury to the quality of the water, but relied more particularly upon the injury sustained by the reason
71 of the filling in of the sand and sediment, not only requiring the services of one man extra to keep the sand out, but that it diminished the capacity of the ditch, and caused far more labor to clean the same out in the spring than would otherwise be necessary. And we should not call the attention of this court to this branch of the case if it was not to show how, in our opinion, the evidence on the part of the appellants has been ignored and distorted by the findings contained in the written opinion set forth in the transcript. Let us glance at the evidence as to the deterioration of the water.

Frank Taylor, one of the oldest and most reliable and extensive miners in Last Chance Gulch, testified: "Am engaged in mining in Last Chance Gulch; get water from Helena water-ditch. The water was muddy in June, 1871. My foreman called my attention to the muddy condition of the water. There is a difference of from ten to twenty cents per inch in the value of muddy water and clear water in Last Chance. Price of water was reduced 10 cents an inch in 1871."

W. A. Chessman, another witness, who has mined for many years in Last Chance Gulch, and also in California, and whose judgment
72 or veracity will be questioned by no one acquainted with him: "There is a difference between clear water and muddy water for mining purposes; can do more with clear water. Saves fine gold better. Generally muddy water is worth one-fifth less than clear. I used water from Yaw-Yaw ditch."

John S. Atchinson testified, among other things, as follows: "The effect of the mining up on Ten-Mile is to muddy up the water and charge it with sand and sediment, which comes down into the ditch and fills it up with sand, slum, and sediment. In the spring the water was very muddy, and, in consequence thereof, we reduced the price of water ten cents per inch. Truett, who was superintendent of the ditch, reported complaint of the water being muddy, made by the miners, and after consultation we agreed to reduce the price of water."

M. F. Truett testified as follows: "In 1866, the water from ditch could be used for washing and drinking, and was so used in Helena, and was perfectly clear. In 1871 the water was very muddy, and was not only unfit for washing and drinking purposes, but, in my opinion, was considerably deteriorated for mining purposes. The mining of defendants deteriorated the quality and reduced the quantity of
73 water to a considerable extent; so much so that we were at one time induced to lower the price of water. The difference of price of water of upper ditch was at least 10 cents per inch, owing to the mining operations on Ten-Mile of defendants."

Respondents' witness, P. T. Williams, testified: "The company fixes the price of water. It has bothered us a little each year, and each year it has grown a little muddier. Thompson once made a complaint last summer."

It will be seen from the foregoing extracts from the evidence that the appellants were compelled, in the summer of 1871, to reduce the price of water 10 cents per inch, owing to the same being rendered muddy by the mining of the defendants. This is contradicted by no one. Taylor, a purchaser of the water and a disinterested party, testifies to it. Atchinson and Truett, and defendants' witness, Williams, also states

that there was a reduction, in 1871, of from 40 cents down to 30 cents per inch.

It seems from the evidence that the capacity of the ditch is from 400 to 450 inches, miners' measurement; that it will discharge that amount. A reduction of 10 cents per inch every twenty-four hours would amount to from $40.00 to $45.00 per day; and, notwithstanding this, the chancellor tells the appellants that they are not injured in the least by the deterioration of the water.

74 The chancellor states in his written opinion: "It is admitted that the mining of defendants does not diminish the flow of the water of the creek. And the testimony is entirely conclusive upon the position that the water, after reaching the mines of Last Chance, where it is used, is first-class water for mining purposes, and that it is not diminished in quality or quantity at that point."

And thus by one stroke of the chancellor's pen is all of the evidence above quoted stricken from existence. How true it is that "the pen is mightier than the sword."

We should have passed this finding by without comment had it not been that the injury we *we* proved we sustained by means of sand and sediment being run into appellants' ditch by the defendants' hydraulic works above, has been slaughtered in the same convenient way by ignoring the evidence on the part of appellants. The chancellor finds, with reference to this branch of the case, that the appellants are not materially injured. He says that the ditch has to be cleaned every spring, and did before the mining of the defendants commenced. But it must be remembered that when such cleaning first commenced the ditch was new and the banks continually caving in, and, it appears from the evidence, that if it was not for the mining of the defendants the work of cleaning the ditch during the spring would be little or nothing.

But let us look at the evidence of the witnesses who testified, and

75 not the conclusions of the chancellor:

Martin Holloway "worked on Helena water-ditch in spring of 1870, cleaning it out; also the spring before. I commenced nearly opposite the hot springs and cleaned up to Nelson Gulch, being from 3 to 4 miles. We had considerable sand to contend with. As we went up it grew heavier, and when we got near Nelson we had upwards of one foot. In my judgment, this sand or sediment in the ditch came from riley water running through ditch."

Levi Childs testified: "Worked on ditch, cleaning it out in 1871; commenced at mouth of ditch and worked down to Nelson Gulch, some five miles; sand all the way from four inches to one foot in depth; sand looked as if it had been washed some ways. I think it came into ditch from Ten-Mile Creek."

Jerry Robinson: "There is mining up on Ten-Mile Creek above head of ditch. It is hydraulic mining and sluicing. This mining brings sand and sediment down into the Helena ditch. The water is a good deal thicker in the spring while the miners are hydraulicing. I think the mining above on Ten-Mile causes the sand to come into the ditch. There is sand and sediment carried along the waters of Ten-Mile into the ditch. * * * I helped to clean out ditch last spring. I found from 4 to 14 inches of sand and sediment in the ditch, some places deeper than others. Some days I had from 5 to 7 men helping me clean

76 out ditch; men performed from ten to twelve days' labor each. We only cleaned out 8 miles with this force. I cleaned flume across Nelson Gulch. It is about 300 feet long; found a good deal of sand in it; in some places it was half full, especially in the center; size

of flume, 5 feet wide and about two feet deep; found heavy body of sand about Colorado Gulch; a foot deep; I am familiar with ditch. The effect of 12 inches of sand in a ditch is to decrease the capacity thereof a very great deal; could not give the inches. The depth of sand accumulated where water flowed from ditch into rink was from 4 to 5 feet. This accumulation was in 5 or 6 days; without sand-gates to catch the sand and sediment while mining is going on above, ditch would fill up in less than one month."

John S. Atchinson: "Saw ditch cleaned out this spring about Nelson Gulch; was all of one foot of sand there; flume over Nelson was half full of sand and sediment; expense of cleaning out ditch last spring was $500.00."

M. F. Truett: "I think the water began to be slightly muddy in 1867. It kept growing worse each year, and we were bothered considerably during 1868 by their (defendants') reservoir flowing periodically, and from tailings flowing. In 1869 it grew worse, in 1870 still worse, and in 1871 it became insupportable. The effect produced was the filling up of the ditches, more or less, from the head to the mouth, and which
77 had a tendency to rot the flumes."

"In 1871 the Nelson flume crossing that gulch was about half full of sand and tailings. The ditch was filled up more or less from there to town, and considerably more from there to the head of the ditch; some places it was filled from 18 inches to two feet, in places from two to 300 or 400 yards long." "There was an additional expense cleaning out the ditch this spring, costing about $500.00 extra, and an additional expense of keeping ditch-tender on ditch."

We will not quote farther from the evidence, but apply the finding of the chancellor to the above evidence, and see what becomes of it. If such evidence does not show an injury, then we fail to comprehend the term, and will have to apply to the opinion herein for a definition of the word. It shows that the plaintiffs were compelled to lay out and expend the sum of $500.00 extra and additional to what would have been necessary, had it not been for the filling up of the ditch by the defendants. It is proved conclusively that the flume across Nelson Gulch, some 300 feet in length, and that it was one-half full of sand and sediment when the same was cleaned out. Then it is evident that in the fall preceeding such ditch had only one-half of its natural or original capacity, and the plaintiffs must have been damaged in a large amount by the diminished quantity of water delivered by their ditch for
78 sale. Again, the evidence clearly shows that along the line of the ditch it was filled in the depth of one foot and upwards for long distances. Then if the ditch is 3 feet in depth, it would decrease the capacity thereof nearly one-third. It seems to us the evidence shows that the findings of the chancellor are not based on the evidence. Again, the chancellor does concede that the appellants are put to a little expense by attending to the sand-gate near the head of the ditch; that it cost little something to construct it, and there is a slight loss of water occasioned by sluicing the sand out of it every twenty-four hours, but that such damage and loss is so infinitesimal that a court of equity cannot condescend to notice it.

The chancellor states in his opinion:

"But the proof shows this fact, that the plaintiffs have been compelled to construct a sand-gate, or reservoir, to catch the sand and sediment, and that this, during the mining season, fills up every 24 hours, and that the waters of the ditch have to be used from ten to twenty minutes each day in cleansing this gate or reservoir, and that

one man's services are necessary for that time to clear the sand and sediment from the reservoir," and then finds that no more men are necessary to attend to this ditch because the sand-gate is there than would otherwise be required. Let us again refer to the evidence
79 and see how the finding corresponds with it. We can nowhere find that any witness stated that it required 20 minutes to sluice out the sand-gate, and during that length of time the water run to waste.

Mr. Atchinson testified: "This mining on Ten-Mile has occasioned los and extra expense to the plaintiffs; when they sluice out the sand-gate the water of the ditch at the point of delivery was lessened ten to twenty inches. My superintendent made report to me of the loss of the sale of a head of water for ½ day, owing to the water flowing irregularly. * * * We have had to employ extra help on account of sand. It requires the ditch-tender to go to the sand-gate every 24 hours. If it was not for this sand coming down every 24 hours from Ten-Mile, I could get along with one man less on the ditch. The wages of one man amounts to $125 per month."

There is not a shadow of a contradiction of the above evidence in the record, and this evidence is corroborated by Truett. Then it seems that, although the appellants are compelled to employ one man extra on account of this sand run down upon them by the defendants, and to pay such man $125.00 per month, amounting to about $1,000.00 during the mining season, and although the appellants loose the sale of one head water for ½ day every 24 hours, and although their ditch fills be-
80 fore the end of the season, so as to reduce its capacity from ⅓ to ½, and although the appellants are obliged to pay $500.00 extra on account of the removal of this sand, nevertheless the chancellor gravely finds they are not materially injured.

If the plaintiffs in this action showed that they were entitled to the use and enjoyment of the waters of Ten-Mile, pure and clear, as they appropriated them, then we strenuously urge that these appellants are entitled to the protection which can only be granted by a court of equity.

We cite as authorities governing this case:

8th California, 333.
27 " 480.
11 " 153.
23 " 484.
32 " 166.

But the chancellor states, in his opinion, that he does not think that the facts in the case, and the law, would warrant him in stopping the defendants in their mining operations; that he ought to enjoin them from working their valuable mines. The appellants never have claimed, and never will claim, that the respondents should be enjoined from working their mining-ground. They only have asked, heretofore, that the defendants be enjoined and restrained from mining their tailings and sediment down into the ditch of appellants. This can be
81 easily prevented by the erection of slum-dams on Ten-Mile Creek, and by preventing their tailings, sand, and sediment from flowing below. This is all we ask now, and we urge that the judgment of the court below should be so modified as to direct this to be done. Then the defendants, by an outlay of less than the amount now expended by appellants on account of this sand and sediment, can prevent this injury. We urge that the defendants be put to this expense,

and not the plaintiffs. Again, it seems to us the law will protect a party who goes on and expends the sum of $117,000.00 in valuable works from the acts of those who come after him and seek to destroy his property.

But the chancellor urges that the defendants are responsible and able to respond in damages. We urge this is no reason why they should not be enjoined in this suit. Courts of equity will always interfere, when not to do so would breed interminable and endless litigation—a multiplicity of suits. So has held the highest court of the land. (See .)

Hence the plaintiffs would be compelled to bring many suits against many parties to recover compensation for the injury sustained. And so it would be year after year.

82 While the court can prevent this wrong in this action, by compelling the defendants by its order to detain this sand and sediment above the head of plaintiffs' ditch by dams and cribs.

We respectfully submit that the judgment of the court below should be so modified as to compel this to be done.

CHUMASERO & CHADWICK,
Att'ys for Appellants.

Filed August 17, 1872.

I. R. ALDEN, *Clerk.*

And on the same day, to wit, the 17th day of August, 1872, the said defendants and respondents, by their attorneys, Messrs. Symes and Shober, filed herein in writing, their points and authorities, of which, in words and figures, the following is a copy, to wit:

Brief of respondents.

In the supreme court of Montana Territory.

JOHN S. ATCHINSON & OTHERS, APPELLANTS,
vs.
PETER PETERSON & OTHERS, RESPONDENTS.

This is an appeal from the order of court overruling the motion for a new trial. The case was tried in the court below as an equity case, before the court sitting without a jury.

83 The only way by which the decision of a court, on the facts, sitting without a jury, can be reviewed, is by demanding written findings. (Sanchey vs. McMahon, 35 Cal., 225; 2 Mass., 36.)

There are no written findings in this case, and none were demanded by plaintiffs, as required by section 180, Civil Code. If the written opinion can be considered findings of the court, which we deny, no exceptions were taken to it, and no defect or specification of errors pointed out as required. (See section 180, Civil Code.) (Beans vs. Emanuelli, 36 Cal., 120; Hidden vs. Jordon, 28 Cal., 302.)

Findings must be excepted to specially, and exception saved in the court below. (Isaac Cook vs. Pablo et al., 24 Cal., 241; Warner vs. Holman, 24 Cal., 228; Hurlburt vs. Jones, 25 Cal., 225.)

And must point out specifically wherein the defects consist. (Hidden vs. Jordon, 28 Cal., 302, Ibid.) There were no instructions offered or given, or refused, and no exceptions taken. (See transcript.) There is no sufficient specification of errors in this statement, no pointing out of the particular errors on which the party relied on motion for new

trial. (See transcript, page 95.) Unless the statement contains a specification of the particular errors relied on, on motion for new trial,
84 it shall be disregarded. (Civil Code, sec. 195; 3 Estee, 575; Hulton vs. Reed, 25 Cal., 478.)

It is not enough that exceptions appear scattered through the statement; but it is necessary in the statement to specify the particular errors relied on. (Beans vs. Emanuelli, 36 Cal., 118.) If there had been findings of the court properly excepted to, and proper assignment of errors in this case, there is a conflict of evidence, and the findings of the court on the facts could not be set aside. (Frost vs. Hartford, 40 Cal., 165.) But the preponderance of evidence in this case is on the side of respondents. (See transcript, pages 47 to 74.) We call the attention of the court particularly to the testimony of John Rogers, page 52, of A. G. Getchell, 55, of Carpenter, Hanson, and Davis, pages 57 to 62 of transcript; Snavely and Lawrence, 68 to 73 of transcript. A party mining above on a stream has the right to use the water of the stream, and turn it back into the channel; and if it slightly injures parties who have the prior right to use the water below, it is damnum absque injuria. (Bear River and Auburn W. & M. Co. vs. The New York Mining Co., 8 Cal., 332; Hill vs. King, 8 Cal., 337; Hill vs. Smith, 27 Cal., 479; Phœnix Water Co. vs. Fletcher, 23 Cal., 483.) The question of a considerable injury to the water and ditch of plaintiffs is a question of fact, and there being a conflict of evidence, the findings could not be set aside, (if there had been written findings duly excepted to in
85 the court below.) (Ibid., James vs. Williams, 31 Cal., 211.) Findings of court, on issues of fact, will not be set aside, unless the evidence was such that a verdict would be set aside as contrary to evidence. (Moore vs. Murdock, 26 Cal., 515.) Opinion of court is not a finding. (3 Estee, 432, and authorities cited.) Organic act provides that appeals may be taken from district to supreme court in the manner prescribed by law of the Territory. The written opinion of the court below being a full review of the case, it is unnecessary to further examine the case.

Further and supplementary to the foregoing:

An application for an injunction is an appeal to the extraordinary power of the court, and the plaintiffs are bound to make out a case showing a clear necessity for its exercise. It is the duty of courts rather to protect acknowledged rights than to establish new and doubtful ones. (Hilliard on injunctions, sec. 16.) An application to a court of chancery for the exercise of its prohibitory power or restrictive energies must come recommended by the dictates of conscience, and sanctioned by the clearest principles of justice. (Hilliard on Injunctions, sec. 18.) The right to an injunction is addressed to the sound conscience of the chancellor, acting upon all the circumstances of each particular case. (Hilliard, sec. 18, page 16.) What does the evidence demonstrate in the case at bar? That the respondents were mining
86 on the stream tapped by appellants' ditch 18 or 20 miles above where plaintiffs' ditch taps the same, and at a point above the source of ½ of the water flowing in said stream at the point where plaintiff's ditch taps the waters from said stream, and, according to the evidence of a majority of the witnesses, (having practical knowledge of mining operations,) the water would settle in 4 or 5 miles after being used by defendants, and that no injury had resulted to plaintiffs' ditch from the mining operations of respondents. To have granted an injunction under such circumstances would have wrought great injustice and injury to defendants, and accomplish no good for appellants. An in-

junction is sometimes refused because it would cause great injury to defendant. (Hilliard on Injunctions, sec. 22.) The remedy by injunction is, notwithstanding the statutory provisions for its exercise, only such in the absence of an adequate remedy at law. (Hilliard, sec. 25, p. 23.) If this is an action brought under the practice act of Montana Territory, and to be governed by the same, the appellants have no merit in their case. If proceedings of this character are to be governed by the rules of chancery practice, as laid down by the Supreme Court of the United States, and the chancery practice as it obtains in England, (as well as in those States of the Union where the chancery
87 practice is kept seperate and distinct from that of law,) the appellants have no standing in this court. Respondents insist there never was merit or equity in the case of appellants; and that the appeal in this case is made for vexation and delay; and urge that the judgment of the court below should be affirmed with reasonable damages. The respondents in this case were abundantly able to respond in damages, as shown by the testimony, but appellants well knew that under no such showing as they were able to make, could they recover damages.

G. G. SYMES AND J. H. SHOBER,
Respondents' Attorneys.

Filed Aug. 17, 1872.

I. R. ALDEN, *Clerk.*

And thereupon the said cause was submitted to the court for decision on the appeal.

And afterwards, to wit, on the 19th day of August, A. D. 1872, that being one of the days of the regular term of said court, the said cause coming on for judgment and decision, it is considered and adjudged here by the court that the judgment herein of the court below be affirmed with costs.

88 Thereupon the court delivered herein a written opinion, of which in words and figures the following is a copy, to wit:

In supreme court. Appeal from Lewis & Clarke County.

JOHN S. ATCHINSON ET AL.
vs.
PETER PETERSON ET AL.

Opinion by Wade, Chief Justice.

This is a suit brought by the owners of the Helena Water Ditch Company against the defendants for an injunction to restrain their mining operations on the Upper Ten-Mile Creek. The plaintiffs' ditch taps the the creek about fifteen miles below the mines of defendants on the same stream, and the plaintiffs' claim to be the prior appropriators of the waters of the creek, or so much thereof as is necessary for the purposes of the ditch, and that the mining operations of the defendants injure and damage the waters of the stream, and the ditch of the plaintiffs'. The testimony of the plaintiffs establishes the fact that the plaintiffs commenced their ditch in November, 1864, and continued work thereon until July, 1865, expending within that time about $23,000.00 thereon, and completing two-thirds of the digging required to complete the ditch, when their money failed, and the work suspended. No more

work was performed on the ditch until August, 1866; but the
89 company continued in possession and claiming the ditch until August, 1866, when they sold the same for $4,000.00, and work thereon was resumed, and the ditch completed and put in operation in 1867. There was no abandonment of the ditch within the meaning of the law, for when the work was suspended there was no intention to abandon, and the subsequent sale for a valuable consideration showed the property to be valuable; and there was in fact no abandonment of possession.

The testimony further shows that in 1865 there was mining on the Upper Ten-Mile for two or three months on a small scale; but there was no continuous mining there until 1867, and since that time the proof is not satisfactory as to the continuance or extent of the mining there. The plaintiffs are clearly the prior appropriators of the waters of the Ten-Mile Creek, to the capacity of their ditch, as against the defendants, and as such are entitled to the unobstructed use and flow of the water.

2. The facts herein shown are sufficient to demonstrate that the right to bring this action is not barred by the statute of limitations.

3. The only remaining question, and upon the decision of which the fate of this case depends, relates to the injury and damage to the plaintiffs, and their ditch, and the waters thereof, in consequence of the
90 mining operations of the defendants. The volume of the waters of the stream is increased, by tributaries flowing into it between the head of plaintiffs' ditch and the mines of defendants, from 15 to 18 miles above, about five-sixths, that is to say, the stream where plaintiffs' ditch taps it is about six times as large as at the point where the mining operations of defendants are carried on. If 1,200 inches of water flow down the stream opposite the head of plaintiffs' ditch, 200 inches thereof, or in that proportion, would come from the Upper Ten-Mile at the point where the defendants are mining. The tailings of the defendants are cribbed, and the 200 inches of water, after having been used for mining several times, flow down the stream for fifteen or eighteen miles to the head of plaintiffs' ditch; but before reaching that point is mixed with ten hundred inches of pure water, and in this condition it enters the ditch of plaintiffs. It then flows through the ditch for thirteen miles, and is used for mining purposes in Last Chance Gulch. It is admitted that the mining of defendants does not diminish the flow of the waters of the creek, and the testimony is entirely conclusive upon the proposition that the water, after reaching the mines of Last Chance Gulch, where it is used, is first-class water for mining purposes; and that it is not diminished in quantity or quality at that point.
91 Then the only remaining question relates to the injury and damage to the ditch caused by the flow of this water through it.

There is abundance of testimony tending to show that the water will become clear after having been used for mining, in flowing five or six miles, while upon the other hand there is proof going to show that riley water will never become pure as long as it is in motion, and this latter view is the most satisfactory, and I have not much hesitation in saying, judging from the testimony that the waters of Ten-Mile Creek, at the point where the plaintiffs' ditch taps the same, are discolored, and carry a certain amount of sediment in consequence of the mining of defendants. Before this mining commenced the waters of the creek were pure. Now let us examine the extent of the injury to the ditch. The water is not injured, as we have already shown. Then the only injury that could result is in filling the ditch, and in constructing and tend-

ing the necessary apparatus to keep the sand and sediment from entering the same.

The ditch had to be cleaned each spring, and did before the mining of defendants commenced, and it is not very satisfactorily shown that the cleaning required any considerable more labor since the mining than before. Certainly the flow of the water has not been materially obstructed since the mining commenced. But the proof shows
92 this fact, that the plaintiffs have been compelled to construct a sand-gate or reservoir to catch the sand and sediment, and that this during the mining season fills every twenty-four hours; and that the waters of the ditch have to be used from ten to twenty minutes each day in cleaning this gate or reservoir, and that one man's services are necessary for that time to clear the sand and sediment from the reservoir. The testimony shows that this ditch is divided into three sections, and that the services of one man to each section is constantly employed, and was before there was any mining on the creek, to keep the ditch in running order. Mr Atchinson thinks that two men might probably attend to the ditch, if it was not necessary to tend the sand-gate. Then the extent of the injury and damage is reduced to this: The construction of a sand-gate, the use of the water ten minutes each day to wash and cleanse it, and the services of a man for that length of time who is necessarily employed in other services on the ditch, and is not especially there for the purpose of tending the sand-gate, but is on the ditch for general services, working by the month. Does the case come within the range of the decisions cited by appellants in the California Reports? We will examine those cases. In the case of Hill vs. Smith, 27 Cal., page 480, the defendants had been engaged for four weeks in
93 digging up the bed of a creek at points from 600 to 1,000 feet above the head of the ditch, and washing down the earth and water into the ditch, thereby mixing the earth and mud with the water, and that in consequence thereof the sales of water were injured, and the use of the mines destroyed; where the plaintiffs had previously sold 60 inches of water, she was compelled to sell 120 inches at the same price in consequence of the deterioration of its solvent capacity by reason of the sediment and mud from defendant's mining claim, and that some of the miners quit work entirely in consequence of the muddy water. Is this case parallel in any sense to the case at bar? Here the mining was only 600 to 1,000 feet from the head of the ditch, while in the case under consideration it is at least fifteen miles away, and a large volume of pure water mixes with the water from the mines before reaching the ditch. The case in the 23d California, page 480, Phœnix Water Company vs. Fletcher, shows this state of facts: The plaintiffs were the prior appropriators of the waters of the stream, and had constructed a ditch for mining purposes. The defendants erected a dam across the stream above the plaintiffs' ditch for the purposes of a saw-mill, and caused the waters to flow irregularly, at times holding it back, and suffering but a small quantity to flow to plaintiffs' ditch, and at other times letting it down in greatly increased quantity; and that the saw-dust and refuse bark of the mill is thrown into
94 the stream by the defendants, clogging and filling the plaintiffs' ditch and reservoirs, and thereby diminishing their capacity to flow and hold water, and that thereby serious injury was caused to the plaintiffs. The exact nature and extent of the injury is not stated, but it may well be supposed that the irregularity in the flow caused by the mill and dam of defendants was the chief source of damage, as that was one of the principal points decided in the case; and as to this point

the doctrine in the case of the Bear River and Auburn Water and Mining Company vs. The New York Mining Company, 8th California, page 327, that the first appropriator of water for mining purposes is entitled to have the water flow without material interruption in its natural channel, is approved and confirmed. In the case under consideration there was no material, if any, interruption in the flow of the stream, and no complaints from the miners for irregularity in the supply of water from the ditch.

The doctrine that the first appropriator of water for mining purposes is entitled to the waters of a stream as against subsequent appropriators without material interruption in the flow thereof, or in quantity or quality, is fully recognized. This proposition has been to' long established in this mining region to be now called in question, and I apply this doctrine to the case in hand. The waters of Ten-Mile Creek, at the the place where it enters plaintiff's ditch, is first-class water for mining purposes. It is of the same quality when it reaches the
95 mines of Last Chance, and the only damage to the plaintiffs, in consequence of the mining of defendants, is the work of one man for from ten to twenty minutes each day, and the use of the waters of the ditch for that length of time; and this service is performed by a man working by the month, and his pay is not thereby increased. This sand-gate is effectual in its operation, and the task of cleansing the ditch each spring is not materially increased in consequence of the mining above. Then it only remains to say that the nature and extent of the injury complained of is not such as would authorize or justify the granting of the injunction prayed for.

Mining upon the upper Ten-Mile will cause the waters of the stream to be discolored, and to carry a certain amount of sediment for many miles below plaintiffs' ditch, and to grant the injunction would necessarily cause the defendants to cease mining. There is one further consideration. The defendants are shown to be responsible for their acts. Their mining claims are shown to be worth from fifteen to twenty thousand dollars each, and this testimony is not disputed; and there is no testimony tending to show the insolvency of defendants, and for the purposes of this case they must be taken to be solvent and responsible. The effect of an injunction is to prevent an irreparable injury, and it is not applicable to those cases where the parties have an adequate remedy at law. In this case, if the defendants
96 have injured the plaintiffs, a suit for damages would be the appropriate remedy, the defendants being responsible and solvent. It would require a very strong case for an injunction to justify the granting thereof, when such an act would cause infinitely more damage than it would remedy; and this is the case at bar. The matter of granting or refusing an injunction is very much in the discretion of the court, and we think a sound discretion was exercised in the case at bar.

Judgment affirmed with costs.

D'S. WADE, *Chief Justice.*
HIRAM KNOWLES, *Asso. Justice.*
JOHN L. MURPHY, *Asso. Justice.*

Filed August 19th, 1872.

I. R. ALDEN, *Clerk.*

And thereupon, on the same day, after the affirmance of the said judgment of the court below, the said plaintiffs and appellants, by their said attorneys, Chumasero & Chadwick, moved the court for an appeal from the said judgment affirming the judgment of the said district court

to the Supreme Court of the United States, which appeal was duly granted and allowed.

And afterwards, to wit, on the 24th day of August, A. D., 1872, the said appellants filed with the clerk of the supreme court of Montana Territory their undertaking herein on appeal to the Supreme Court
97 of the United States, of which in words and figures the following is a copy, to wit:

Supreme Court of the United States.

JOHN S. ATCHINSON, MARY L. ATCHINSON, his wife, and Harriet B. Truett
vs.
PETER PETERSON, GEORGE TRAVIS, W. H. Phelps sued as Richard Roe, William Fay sued as John Den, M. Munroe sued as Richard Fenn, & William Collum sued as Samuel Doe.

Know all men by these presents that we, John S. Atchinson, by his attorney in fact, William A. Chessman, William A. Chessman, and C. J. Lyster, of Helena, in the Territory of Montana, are held and firmly bound unto Peter Peterson, George Travis, W. H. Phelps, William Fay, M. Monroe, and William Collum, of said Territory, in the sum of ten hundred dollars, to be paid to the said obligees, their executors, or administrators; to which payment well and truly to be made, we bind ourselves, jointly and severally, by these presents, sealed with our seals, dated this 23rd day of August, A. D. 1872.

Whereas the above named John S. Atchinson, Mary L. Atchinson, & Harriet B. Truett have taken an appeal to the Supreme Court
98 of the United States, to reverse the decree rendered in the above-entitled action by the supreme court of the Territory of Montana:

Now, therefore, the condition of this obligation is such, that if the above-named John S. Atchinson, Mary L. Atchinson, and Harriet B. Truett shall prosecute their said appeal to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

JOHN S. ATCHINSON. [SEAL.]
By his attorney in fact, W'M A. CHESSMAN. [SEAL.]
W'M A. CHESSMAN. [SEAL.]
C. J. LYSTER. [SEAL.]

Sealed & delivered in presence of—

Bond fixed at $1,000.00, and above approved by—
D. S. WADE,
Chief Justice of Supreme Court, Montana Territory.

Filed August 24th, 1872.
I. R. ALDEN,
Clerk Supreme Court of Montana Territory.

And afterwards, to wit, on the 3rd day of September, A. D. 1872, the said plaintiffs and appellants filed herein their citation, the original being hereunto attached and made a part of this record, and recites as follows, to wit:

99 By the honorable the supreme court of the Territory of Montana.

To Peter Peterson, George Travis, W. H. Phelps, William Fay, M. Munroe, & William Collum.

Whereas John S. Atchinson & Mary L. Atchinson, his wife, & Harriet B. Truett have lately appealed to the Supreme Court of the United States from a decree lately rendered in the supreme court of the Territory of Montana made in favor of you, the said Peter Peterson, George Travis, W. H. Phelps, William Fay, M. Munroe, and William Collum, and have filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court at the city of Washington, on the first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at Helena, in the district of Montana, on the 27th day of August, A. D. 1872.

[SEAL.] D. S. WADE,
Chief Justice Sup. Court Montana Territory.

100 I hereby admit service of a copy of the within citation this 30th day of August, A. D. 1872.

SYMES & SHOBER,
Att'y' for Appellee.

(Indorsed:) John S. Atchinson et al., appel't, vs. P. Peterson et al., appellees. Citation. Filed Sept'r 3, '72. I. R. Alden, clerk.

101 In the supreme court of Montana Territory.

JOHN S. ATCHINSON, MARY L. ATCHINSON, and Harriet B. Truett, pl'ffs & appellants,
vs.
PETER PETERSON, GEORGE TRAVIS, W. H. Phelps, William Fay, M. Munroe, and W'm Cullum, defendants & respondents.

I, Isaac R. Alden, clerk of the supreme court of the Territory of Montana, do hereby certify the foregoing to be a full, true, and correct copy of the proceedings had and done, and of the papers, pleadings, and orders in the above-entitled action, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Virginia City, in said Territory, this 26th day of September, A. D. 1862.

[SEAL.] ISAAC R. ALDEN, *Clerk.*

(Indorsement on cover:) No. 318. John S. Atchinson, Mary L. Atchinson, and Harriet B. Truett, appellants, vs. Peter Peterson, George Travis, W. H. Phelps, William Fay, M. Munroe, and William Collum. Montana Terr'y, sup. c't. Filed 4th December, 1872.

Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 45.

JOHN S. ATCHINSON ET AL., APPELLANTS,

vs.

PETER PETERSON ET AL.

Appeal from the Supreme Court of the Territory of Montana.

BRIEF FOR APPELLANTS.

I.

This is an appeal from a "judgment," or decree, of the Supreme Court of the Territory of Montana, in a suit for an injunction, which had been instituted by the appellants in the Third Judicial District Court of that Territory, in July, 1871, to restrain the appellees from the further commission of the injuries and damages complained of by the appellees.

The plaintiffs set forth, in their complaint, that they and those under whom they claim had acquired, by prior appropriation, the exclusive right to use so much of the waters of a certain stream called Ten Mile Creek, as would fill certain ditches constructed by them, and known as Helena and Yaw-Yaw ditches, which extend from the said creek to Last Chance and Dry Gulches in said Territory; that the said ditches were constructed at great expense, and were intended to convey water from the said creek to the said gulches, for mining purposes; that subsequent to the appropriation of the waters and the completion of the ditches aforesaid, the defendants commenced mining operations on the said creek, above the points

where the plaintiffs' ditches tap the same, and have, since then up to the present time, carried on mining operations there, using the waters of the said creek in such manner as to obstruct its flow through the said ditches, deteriorate it in quality and value, and cause the said ditches to be filled with mud, tailings, and sediment, whereby the plaintiffs sustain great damage; that the defendants threaten to continue these wrongful acts; and that the plaintiffs have no adequate remedy at law, *etc.*

The issues raised by the answer of the defendants were tried by the district judge, who, upon the testimony submitted, found that the plaintiffs, as against the defendants, were the prior appropriators of the waters of Ten Mile creek to the capacity of their ditch, and entitled to the unobstructed use and flow thereof, but that the extent of the injury complained of was not such as to justify the granting of the relief prayed for, and judgment was accordingly given for the defendants, which, on appeal, the Supreme Court of the Territory affirmed.

The Court below erred in affirming the judgment of the District Court; because, as is claimed by counsel for appellants, that judgment was against both the evidence and the law of the case.

II.

First, as to the evidence. This establishes, beyond any doubt, the fact that the water of the stream was so deteriorated in quality by the mining operations of the defendants, that the plaintiffs thereby suffered a loss of at least 10 cents per inch. See testimony of Truett; (*Printed Record, p.* 10;) of Atchinson and Taylor; (*Ibid, p.* 7;) also, of Chiesman, (*Ibid.*, p. 7.) This loss, taking into consideration the capacity of the ditch, which is estimated at 400 to 450 inches, miners' measurement, would probably amount

to $40 or $45 a day. But the main damage is caused by the filling up of the ditch with tailings, sand, and slum, which, during the mining season, flow from the works of the defendants above. On this point, the evidence clearly shows that the plaintiffs have been, and are, put to great expense in cleaning their ditch of the obstructions to the passage of the water through the same, so brought about, from to time. See testimony of Robinson, (*Record, p.* 5 ;) of Childs and Holloway, (*Ibid., p.* 5 ;) of Atchinson, (*Ibid., p.* 7 ;) and of Truett, (*Ibid., pp.* 8 *to* 12.) From this, it appears that but for the tailings, sand, *etc.*, flowing from defendants' works, the plaintiffs could get along with one man less in the care and management of their ditch. The wages of one man amount to $125 a month, or about $1,000 for the mining season ; so that, in this item alone, the damage occasioned by the defendants is considerable. But there are other extra expenses incurred and losses sustained, all owing to the cause above mentioned, which enhance the damage greatly beyond that figure.

Next, as to the law applicable. In the opinion of the Court below, it is observed: "The doctrine that the first appropriator of water for mining purposes, is entitled to the waters of a stream as against subsequent appropriators, without material interruption in the flow thereof, or in quantity or quality, is fully recognized. This proposition has been too long established in this mining region, to be now called in question." Here the Court lays down correctly the general principle governing this case. In accordance with that principle, it has been held, that where a ditch has been excavated from the bed of a stream, and its water has been diverted through the same for mining purposes, a miner has no right to work a claim located above its head, after the ditch is dug, in such manner as to mingle mud and sediment with the water, and injure its value to the ditch owner for mining purposes, or to fill up the ditch with the same, so as to lessen its capacity and

increase the expenses of cleaning it out.—See Hill *vs.* Smith, 27 *Cal.*, 476.

With regard to injuries of this sort, the prior appropriator is unquestionably entitled to protection against future loss or damage consequent thereon. Referring to the same subject, the Supreme Court of California remark: "The prior appropriator is clearly entitled to protection against acts which materially diminish the quantity of water to which he is entitled, or deteriorate its quality for the uses to which he wishes to apply it."—Phoenix Water Co., *vs.* Fletcher, 23, *Cal.*, 487.

III.

It is submitted, that the appellants are entitled to the protective relief prayed for, and that the denial thereof by the Court below was error. The object of this suit being, not to enjoin the appellees from working their mining claims, but to restrain them from so conducting their mining operations as to impair the value of the water flowing to appellants' ditch and cause it to be filled with tailings, sand, *etc.*, whereby the latter sustain serious damages, this object might be obtained if the judgment or decree below were shaped in such way as to require the appellees to erect "slum-dams," or provide other suitable means to prevent their tailings, sand, *etc.*, from being carried below.

ROBERT LEECH,
Of Counsel for Appellants.

Supreme Court of the United States,

OCTOBER TERM, 1873.

NUMBER 318.

JOHN S. ATCHISON, MARY L. ATCHISON, AND HARIET B. TRUETT, APPELLANTS,

VS.

PETER PETERSON, GEORGE TRAVIS, W. H. PHELPS, WM. FAY, M. MONROE, AND WM. COLLUM, APPELLEES.

In Error to the Supreme Court of the Territory of Montana.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This is a suit in equity seeking to perpetually enjoin the defendants from working their valuable placer mines near the head of Ten Mile creek, because, as alleged, such working injures the plaintiffs by deteriorating in quality the waters of said creek, which plaintiffs claim by prior appropriation; and, also as claimed, injures their water ditch through which they run the water to gold mines to sell to miners.

The plaintiffs allege in their bill of complaint, in substance, that they are the owners by prior appropriation of the waters of Ten Mile creek, and of the Helena and Yaw-Yaw ditches, constructed at great expense to convey the waters of said creek to placer gold mines for sale to miners, whereby they realized large gains and profits; that the defendants subsequent to the appropriation of said water and construction of said ditches by plaintiffs went upon said creek above the point of diversion by said ditches and commenced mining and sluicing and reservoiring the waters of said creek, and thereby filled the waters with mud, tailings and sediment, which washed down into plaintiffs ditches, injuring the quality of the water, lessening the flow there-

of, and filling up and injuring the ditches; and praying for a perpetual injunction against defendants.

Defendants answer and deny the appropriation of the water as alleged in the complaint; admit that they and their predecessors in interest had been mining on Ten Mile creek above the point where the plaintiffs' ditches divert the water therefrom during the years 1867, 1868, 1869, 1870 and 1871; deny that these mining operations injure the quality or quantity of the water, or fill up or injure the plaintiffs' ditches, or damage or injure the plaintiffs in any manner whatever; and allege that they and their predecessors in interest appropriated the waters of said creek in the spring of the year 1865, for mining purposes, to work and mine a tract of mining ground which they located and owned along the bank of said creek about fifteen miles above the head of plaintiffs' ditches; that they then commenced using the waters of said creek to mine said ground, which was rich in gold; that they appropriated and used the waters of said creek at that point; that it does not exceed forty to fifty inches, miner's measurement, at the place of their mining operations; that there naturally flows in said creek at the point where plaintiffs' ditches divert the same about two thousand inches, all of which, except the forty or fifty inches used by defenants, flows into the said creek from tributaries below the mining operations of defendants; and that defendants had for more than five years had exclusive, peaceable possession of said mining ground and water rights, and plead the statute of limitations; deny insolvency.—*Record*, p. 1, 2, 3, 4.

The suit was tried before the Third Judicial District Court for Lewis and Clarke county, Montana Territory, sitting in chancery, without a jury, and decree rendered for defendants, denying injunction and for costs, on the 25th day of November, 1871. Motion for new trial made and overruled, and appeal taken to the Supreme Court of the Territory and the decree affirmed there at the August term, 1872.

There are no bills of exceptions to any rulings or decisions of the Court during the progress of the suit, no special findings of fact were requested or made by the Chancellor, and the only question presented in this appeal is, does the evidence justify the decree; or were the appellants on the evidence appearing in the record entitled to a decree perpetually enjoining the appellees from carrying on their mining operations.

BRIEF OF ARGUMENT.

We agree with the appellants that the doctrine of prior appropriation of water for useful and beneficial purposes, giving the right to divert it from the stream and hold it, is the law of Montana Territory; and that the first person who constructs a ditch and diverts the waters of a stream into it for a useful and beneficial purpose, is entitled to be protected in the use of the water, for the object and purpose of the appropriation, as against all subsequent appropriation, and all riparian owners where rights accrued after the appropriation; modified by the amount and particular use for which the water is claimed.

This law, which mostly grew up in California and is adopted by most of the States and Territories where placer mining exists, is recognized and confirmed by the 9th section of the Act of Congress of July 26th, 1866.–14, Statutes U. S., 259, sec. 9; Ortman vs. Dixon, 13 Cal. 33; Yale, on Water Rights, 179, 177; Bute Canal and Ditch Co. vs. Vaughan, 11, Cal. 143, 154; Opinion by Field, Justice; Irvin vs. Philips, 5, Cal. 140, 146; Hill vs. King, 8, Cal. 338.

The appellants claim in this case rests on an appropriation for mining purposes, and their being entitled to a perpetual injunction must depend on the amount of injury the appellees' mining operations on the stream above did to the water right and ditches of appellants, when used for conveying water and selling it to be used for placer mining; which is the only object and purpose of appellants' appropriation.—Yale, on Water Rights, 179; *Ibid*, Ortman vs. Dixon, 13 Cal. 33.

A use of the water above on a stream for mining, and turning it back into the creek, might be entirely inconsistent with the use and enjoyment of the water by a prior appropriation below for some uses, when it would not cause any injury to an appropriation to be used for mining purposes. In Ortman vs. Dixon, 13, Cal. 33, the Court say:

"The measure of the right as to extent follows the nature of the appropriation, or the uses for which it is taken."

It is an established proposition, where this doctrine of prior appropriation prevails in the mining communities, that while the first appropriator should be protected in his prior rights, that the waters of the streams in the mineral regions must be utilized to the greatest practical extent to wash the gold from the earth, consistent with the ordinary protection of the rights of prior appropriators in the use of the waters for the purpose for which it was first claimed; and that if the use of water on a stream for mining, and turning it back above the head of a ditch of a prior appropriator, does only to a limited extent deteriorate the quality of the water or fill up the ditch only a little, so as not to interfere with the practical and beneficial use of the water right for mining purposes, it is *damnum absque injuria*.

This doctrine is fully commented on by Mr. Justice Burnett, in the case of the Bear River and Auburn Water and Mining Co. vs. the New York Mining Co, 8, Cal. 337, where it is said: "That it was the intention to distribute the bounty of the Government among the greatest number of persons, so as most rapidly to develop the hidden resources of this region; while at the same time the prior substantial rights of individuals should be preserved. In working mines, water is an essential element; therefore, that system which will make the most of its use without violating the rights of individuals will be most in harmony with the end contemplated by the superior proprietor."

See, also, Hill vs. King, 8, Cal. 337; Yale, on Mining Claims and Water Rights, 182.

In the case of Esmond vs. Chew, 15, Cal. 137, 143, which was a suit brought by subsequent appropriators of mining claim and water right on a

stream against a prior appropriator above for flooding. and filling his claim with tailings and sediment, so as to stop his work and mining, the Court say:

"The true rule is that each person mining on the same stream is entitled to use, in a proper and reasonable manner, both the channel of the stream and the water flowing therein; and where, from the situation of the different claims, the working of some will necessarily result in injury to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be *damnum absque injuria*, and will furnish no cause of action to the injured party. The reasonableness of the use is a question for the jury, to be determined by them upon the facts and circumstances of each particular case."

Esmond vs. Chew, 15, Cal. 137, 143; Bute Canal and Ditch Co. vs. Vaughan, 11, Cal. 143; Yale, on Water Rights, 177, 179.

Applying these principles to the facts and circumstances of this case, are the appellants entitled to the extraordinary remedy of a perpetual injunction?

It is shown by the evidence that the lower or Yaw-Yaw ditch of appellants was filled with muddy water, tailings and sediment from a flume and mining operations in Nelson Gulch, a tributary of Ten Mile creek emptying into the same many miles below the mining operations of appellees, and below the head of the Helena ditch and just above the head of said Yaw-Yaw ditch; so that the only pretense of injury which the appellants have is confined to the Helena ditch above.

The testimony on the part of appellees shows, uncontroverted, that it is fifteen or eighteen miles from the head of appellants' ditch, or point of diversion, to the mining claims and operations of appellees; that there is only from 100 to 200 inches of water in the creek and used by appellees at the point of their mining operations near the head of the stream, and from 1,500 to 2,000 inches, miners' measurement, at the point of diversion by appellants' ditch; that this 1,300 to 1,700 inches additional water flows into the creek from tributaries of clear water between the appellees' mining claims and appellants' ditch; being over five-sixths of clear water mixing with one-sixth of roiley water while running sixteen miles; and that the Helena ditch diverts about 500 inches of this water and takes it eighteen miles, the length of the ditch, to placer mines to sell to miners.

See testimony of Atchison,—*Record*, 8; of Rogers, 13, 14; of Connor, 14; of Demer, 15; of Carpenter, 15; of Nicholson, 16.

We submit that these undisputed facts are enough to disprove the evidence of appellants as to the character of the water, and its injury to the ditch and water for mining purposes; but the testimony of the following witnesses,—men who bought the water from appellants and used it for mining, and others who used it from the ditch for domestic purposes,—so conclusively show that the appellants were not injured in their prior rights, if they are prior, by the use of a portion of the water by appellees, that the Chancellor, as stated in his written opinion, could not doubt that there was

no such injury shown as would justify a perpetual injunction enjoining the working of the valuable mining operations of appellees.

See testimony of Pierce,—*Record*, p. 13; of Connor, 12; of Rogers, 13, 14; of Williams and Getchell, 14; of Dance, Humphries and Carpenter, 15; of Hanson, Nicholson, Davis, Simpson, Cunningham, Maxwell, Allen, Travis and others, 16, 17, 18, 19.

These witnesses, most of whom used the water, all testify that it was clear and first-class water for mining purposes, and even good for domestic use; those who have cleaned out the ditch and examined it testify to there being no tailings or sediment of consequence in it; that the most there was ran into the ditch from the hill-side, and that the ditch, like all mining water ditches, had to be cleaned out in the spring anyway. Those familiar with the ditch and creek and mining say that the water became clear after running five to six miles, and some testify that roiley water was better for mining and not injurious to a ditch; and the evidence shows no extra labor was required on the ditch on account of muddy water, and that a sand-gate is necessary at the head of a ditch whether or not there is mining above on the stream.

Against the testimony of these twenty or more witnesses is the evidence of Atchison, appellant and owner of ditch, Truett, a party interested, and two or three of their laborers, testifying to some injury to the ditch and water.

P. T. Williams, agent for appellants for the sale of the water, testifies that the price of the water was not reduced on account of its being muddy. *Record*, p. 17, 18.

We submit that the evidence overwhelmingly preponderates in favor of the decree for appellees; but this is not necessary to support the decree.

It is enough for appellees if all the material facts alleged in the bill are denied in the answer, and the evidence leaves it in doubt.

Parker vs. Winnipiseogee Lake Cotten and Woollen Co., 2 Black, 545; Irvin vs. Dixon, 9 How. 6.

The question of equitable relief in this case depends on the prior rights of the parties, the considerable amount of injury and damage, and must, as stated in the decisions herein cited, be governed by the facts and circumstances of each particular case, and is a question of fact for the jury,—8 Cal. 335; 13 Cal. 38, 39; 11 Cal. 152.

We insist, therefore, that unless all the facts and circumstances upon which the appellants' claim to relief rests—the prior rights, the considerable amount of damage to their property, insolvency, irreparable injury, and threatened continuance—be conclusively shown, the injunction must be refused; at least until appellants establish their rights and amount of damage in an action at law.—Cases first above cited.

The injury complained of is a private nuisance, and in the case cited, 2 Black, 550, a suit seeking an injunction for private nuisance, this Court, by Mr. Justice Swayne, said:

"We have looked carefully into the evidence upon the subject; the result is, we are left in doubt on which side lies the truth. We have failed to find those clear facts of right on one side and wrong on the other necessary to quicken into activity the powers of a Court of Equity." Again—"The right must be clear and its valuation palpable."

If the evidence be conflicting and the injury doubtful this extraordinary remedy will be withheld.—*Ibid*, 2 Black, 550, 552, and cases there cited.

And in the case of Irvin vs. Dixon, 9 How, 6, a case seeking a perpetual injunction for private nuisance, the Court say:

"It is better, whether the nuisance be private or public, where the injury is not great and pressing, to resort to redress in an action at law." "And when the right or title to the property in controversy, or to do the act complained of, is as here doubtful and expressly denied in the answer, no permanent or perpetual injunction will usually be granted till such trial at law be had as will settle the contested rights and interests of the parties."—*Ibid* 9 How, 9, and cases there cited.

This is a jurisdictional question in the United States Courts, and need not be insisted on by demurrer or answer.—*Ibid* 2 Black 550; 5 Peters 496; 2 How, 383.

We submit that this suit comes clearly and fully within the principles in these cases, and is governed by them.

A perpetual injunction will not be granted where it will cause great and irreparable injury to valuable property rights of defendants, in the event of the plaintiffs not being conclusively and exclusively entitled thereto; but the Court will balance the inconveniences, and leave the party to recover damages at law. In this case the appellees were shown to be solvent, as stated by the Chancellor in his written opinion.—Hilliard on Injunctions, 22, sec. 39.

If the law gives a perpetual injunction on the facts of this case, half the mining operations in Montana Territory will be worthless, that under rules of law that have become rules of property, have been regarded and treated as among the most valuable interests in the Territory.

The cases in California, cited and relied on by appellants to show that the injury complained of is of such a character and degree as entitle them to a perpetual injunction, are not analogous. The case of Phœnix Water Co. vs. Fletcher was a case tried before a jury at law, the action for damages being joined with suit for injunction under the California Code, and the evidence and undisputed facts show a very material injury by the subsequent appropriator to the prior rights of the plaintiffs. It was shown that the flow of the water to the ditch of plaintiffs was very irregular, by reason of reservoiring the water in a mill-dam, and that the water was charged with sawdust and bark, and the Court reversed the case for errors in not properly submitting the facts in special findings to the jury; and the case in 8 Cal. 337, herein cited to sustain decree, is referred to and affirmed.

The case of Hill vs. Smith, 27 Cal. 476, relied on by appellants, was also tried before a jury for damages and an injunction. The facts of the case show that the defendant—a subsequent appropriator—commenced mining and digging up the earth in the stream 600 to 1,000 yards above the head of plaintiffs'

ditch, and that it filled up the ditch and reservoir, and charged the water with mud, tailings and sediment, so as very materially to lessen the flow and injure the water; that some of the miners who had been purchasing it, ceased using it; and over 100 inches had to be furnished where 60 inches were sufficient before acts of defendants. This is entirely different from the case at bar, where the mining is fifteen to twenty miles above ditch, and not more than one-sixth of the water used. In these cases the Courts hold to the same doctrine contended for herein.

The appellants, in their brief filed in the Superior Court of the Territory, only seem to ask for order of Court enjoining appellees to crib their tailings. The evidence shows that some of appellees deposited their tailings some distance from the creek, and others felled timbers and cribbed them, and that they did not reservoir the water.

See testimony of Carpenter,—*Record*, 15; of Travis, p. 18.

We contend that the rights of appellees, as prior appropriators for mining purposes, are not so absolute as those of riparian owners under the Common Law, and their rights depend entirely on the doctrine of prior appropriation in this suit; for if the law of riparian ownership is to govern this case the appellants have no rights against appellees. They divert the water from the stream, but appellees' mining ground is on the bank, and they have a right to utilize their property by using the water flowing over it, because they are riparian owners.—Hill vs. King, 338.

We submit the appellants' cause of action is barred by the statute of limitations of Montana Territory.—Laws of 1865, page 466, provide:

"That no action for the recovery of a mining claim, (lead claims excepted,) or for the recovery of the possession thereof, unless it appear that the plaintiff or his assigns were seized or possessed of such mining claims within one year before the commencement of such action."

The water rights in controversy in this suit are appurtenant to placer mining claims, and governed by same limitations.

But if the water rights herein are, under the Common Law, to be considered real estate, the suit is barred by limitation. The 3d section of the Act above cited states that:

"Any peaceable entry upon real estate shall be deemed sufficient and valid as a claim unless an action be commenced by the plaintiff for possession within one year from the making of such entry, or within three years from the time the right to bring such action accrued."

The evidence shows the appellees had appropriated and possessed and been using the waters of the creek for more than three years before the commencement of the suit.

We submit that the decree should be affirmed.

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